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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 211.

GAST REALTY AND INVESTMENT COMPANY AND EMILY
GAST, PLAINTIFFS IN ERROR,

vs.

SCHNEIDER GRANITE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JULY 24, 1914.

(24,322)

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a In the Supreme Court of Missouri, April Term, 1914.
Division No. Two.

Be it remembered, that on the 29th day of June, 1914, in a certain cause then pending in this Court, in which Schneider Granite Company, a corporation, was Respondent and Gast Realty & Investment Company, a corporation, and Emily Gast, were Appellants, No. 16439, the following proceedings were had and entered of record, to-wit:

16439.

"SCHNEIDER GRANITE COMPANY (a Corporation), Respondent (Defendant in Error),

vs.

GAST REALTY & INVESTMENT COMPANY (a Corporation) and EMILY GAST, Appellants (Plaintiffs in Error).

Now at this day there is presented to Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, in Chambers, a petition for a writ of error to the Supreme Court of the United States, a writ of error from the Supreme Court of the United States to the Supreme Court of Missouri, an assignment of errors and bond in the sum of \$25,000; which said writ of error is allowed, said assignment of errors filed and said bond approved, and made a part of the record herein; a copy of which writ of error was lodged in the office of the Clerk of this Court; the writ of error and bond to act as a supersedeas and stay of execution."

And afterwards, to-wit, on July 1st, 1914, the following further proceedings were had and entered of record in said cause:

16439.

"SCHNEIDER GRANITE COMPANY (a Corporation), Respondent (Defendant in Error),

vs.

GAST REALTY & INVESTMENT COMPANY (a Corporation) and EMILY GAST, Appellants (Plaintiffs in Error).

Now at this day there is filed herein a citation signed by Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, directed to the said Respondent (Defendant in Error) citing and admonishing it to be and appear in the Supreme Court of the United States, within thirty days from the date thereof, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error, should not be corrected, together with written acceptance and acknowledgement of due service of said citation by Defendant in Error."

And thereafter, to-wit, on the same day, the following further proceedings were had and entered of record in said cause:

16439.

"SCHNEIDER GRANITE COMPANY (a Corporation), Respondent (Defendant in Error),

vs.

GAST REALTY & INVESTMENT COMPANY (a Corporation) and EMILY GAST, Appellants (Plaintiffs in Error).

Come now the said Plaintiffs in Error, by attorney, and file herein præcipe for transcript to be filed in the Supreme Court of the United States, together with written acceptance and acknowledgement of due service thereof signed by Defendant in Error."

1 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Missouri before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit at the April Term 1914 of said Court between Schneider Granite Company Plaintiff and Respondent against Gast Realty and Investment Company and Emily Gast, Defendants and Appellants being Cause Number 16439 in said Court wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the

2 Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Gast Realty and Investment Company and Emily Gast as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to cor-

rect that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of June, in the year of our Lord one thousand nine hundred and fourteen.

JOHN B. WARNER,
*Clerk of the District Court of
the United States for the
Central Division of the
Western District of Mis-
souri.*

By H. C. GEISBERG, *Deputy.*
[Seal of the United States District Court of Missouri, Central
Division, Western District.]

Allowed by
HENRY LAMM,
Chief Justice of the Supreme Court of Missouri.

[Endorsed:] Writ of Error. Filed Jun- 29, 1914. J. D. Allen,
Clerk.

3 In the Supreme Court of the State of Missouri, Division Num-
ber Two.

No. 16439.

THE SCHNEIDER GRANITE COMPANY, a Corporation, Plaintiff and
Respondent,

v.

GAST REALTY & INVESTMENT COMPANY, a Corporation, and EMILY
GAST, Defendants and Appellants.

To the Honorable Henry Lamm, Chief Justice of the Supreme Court
of the State of Missouri:

Now come the Gast Realty & Investment Company and Emily
Gast, the defendants and appellants in the above entitled cause, and
allege that they are citizens of the United States of America; that
the above entitled cause is a suit upon a special tax bill issued by
the City of St. Louis to plaintiff and respondent for the making and
paying of a certain portion of Broadway in said City of St. Louis,
upon which certain property of the defendants and appellants abuts.

That in the above entitled cause there was and is drawn in question
the validity of a statute and the validity of authority exercised under
a statute of the State of Missouri, towit, the validity of Section 14
of Article VI of the Charter of the City of St. Louis, a city located in
said state, and the validity of the authority exercised under said
provisions.

4 It was and is contended by defendants and appellants that
the western boundary of the benefit district affecting the prop-

erty involved in the present tax bill, was erroneously fixed half way between Broadway and Church Road, and, further, that if Section 14 of Article VI of the Charter of the City of St. Louis, be construed to authorize the fixing of the boundary line in such manner, then such charter provision was and is in conflict with section 1 of the Fourteenth Amendment of the Constitution of the United States and of sections 20 and 30 of Article II of the Constitution of the State of Missouri.

The defendants and appellants further allege that the validity of said provisions of said Section 14 of the Charter and of the authority exercised thereunder, was and is so drawn in question on the ground that said provisions of said section 14 are repugnant to the Constitution of the United States, and more especially to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to sections 20 and 30 of the Constitution of the State of Missouri, in that said provisions of Section 14 provide for the taking of property without due process of law, and further in that they deny to persons within the jurisdiction of the State of Missouri and also to persons within the jurisdiction of the City of St. Louis and more particularly to such persons owning land in said city, including these defendants and appellants, the equal protection of the law; that in the above entitled cause, final judgment was entered against your petitioners in the Supreme Court of the State of Missouri, that being the highest court of law and equity in said State of Mis-

5 souri, whereby it was adjudged that said provisions of said section 14 of Article VI of the Charter of the City of St. Louis and the authority exercised thereunder, are not in conflict with and are not repugnant to the Constitution of the United States and especially that the same are not in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States, and wherein it was further adjudged that the provisions of said Section 14 are valid.

2. That there was and is drawn in question the validity of a further statute and the validity of the authority exercised under a statute of the State of Missouri, to wit, the validity of the provisions of Section- 15 and 27, and the validity of the authority exercised under said sections; that the validity of the provisions of said section and the validity of said authority exercised thereunder is so drawn in question on the ground that the provisions of said section are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the provisions of said section of the Charter provide for the taking of property without due process of law, and further deny to persons within the jurisdiction of the State of Missouri, and more particularly to these defendants and appellants, the equal protection of the law; and that in the above entitled cause final judgment was rendered against your petitioners by the Supreme Court of Missouri, adjudging that said sections 15 and 27 of Article VI of the Charter of the City of St. Louis and the authority exercised thereunder, are not in conflict with and are not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and wherein it was

adjudged that the provisions of said sections 15 and 27 are valid.

6 3. That there was and is further drawn in question the validity of a statute, and the validity of the authority exercised thereunder, of the State of Missouri, towit, the validity of the provisions of Sections 15, 27, and 28 of Article VI of the Charter of the City of St. Louis, Missouri, and the validity of the authority exercised under those sections; that the validity of said provisions of sections 15, 27 and 28 and of said authority was and is so drawn in question on the ground that said provisions are repugnant to the Constitution of the United States and especially to Section 1 of the Fourteenth Amendment to the Constitution of the United States in that said provisions provide for the taking of property without due process of law, and further in that they deny to persons within the jurisdiction of the State of Missouri, including these defendants and appellants, the equal protection of the law; and that final judgment was rendered in this cause by the Supreme Court of the State of Missouri adjudging that the provisions of said sections 15 and 27 and 28 of the Charter of the City of St. Louis, and the authority exercised thereunder, are not in conflict with and are not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and wherein it was adjudged that said provisions are valid.

4. That in the above entitled cause there was and is drawn in question the validity of a statute and of the validity of the authority exercised under a statute of the State of Missouri, towit, the validity of Section 14 of Article VI of the Charter of the City of St. Louis, in said State, and the validity of the authority exercised under said provisions in a further particular that has already been
7 heretofore set out in paragraph one of this petition, towit: in that said provision of the charter by its definition of the word "lot" and its provision as to what constitutes a lot, resulted in depriving these defendants and appellants of their property without due process of law, in violation of sections 20 and 30 of Article II of the Constitution of the State of Missouri, and that in the above entitled cause final judgment was rendered against your petitioners by the Supreme Court of the State of Missouri, that being the highest court of law and equity in the State of Missouri, whereby it was adjudged that said provisions of Section 14 of Article VI of said Charter of the City of St. Louis, relating to the word "lot" and property included therein, are not in conflict with and are not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and are not in conflict with Sections 20 and 30 of the Constitution of the State of Missouri.

That the opinion of this court affirming the judgment of the Circuit Court was handed down on the 24th day of March, 1914. That subsequently and in due time, towit, on the 3d day of April, 1914, the defendants and appellants filed their motion for rehearing which was overruled by this Court on May 26, 1914. That subsequently, and in due time, towit, on the third day of June, 1914, the above named defendants and appellants filed in said cause in said Supreme Court of the State of Missouri, in Division Number Two

thereof, a motion to transfer the above entitled cause to the Court en banc, and said motion to transfer was overruled by said Court and said Division thereof on the 23d day of June, 1914; and thereupon said judgment became final:

Wherefore your petitioners, the above mentioned defendants and appellants, pray that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of the State of Missouri, and the Judges thereof, to the end that the record in said cause may be removed to the Supreme Court of the United States and that your petitioners may be allowed to bring up for review before the Supreme Court of the United States, said judgment of the Supreme Court of the State of Missouri; that citation be granted and signed; that the bond herewith presented be approved and upon compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a supersedeas; and your petitioners further pray that the errors complained of by your petitioners may be examined and said judgment of the Supreme Court of the State of Missouri may be reversed and that your petitioners may have such other and further relief as in the premises may be just and proper; and your petitioners will ever pray.

GAST REALTY AND INVESTMENT
CO. AND
EMILY GAST, *Petitioners*.
JOHNSON, RUTLEDGE & LASHLY AND
ROBERT A. HOLLAND, JR.,
By THOMAS G. RUTLEDGE,
J. M. LASHLY,
Their Attorneys.

The writ of error as prayed for in the above entitled cause is hereby allowed this 29 day of June, 1914; the Writ of Error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of \$25,000.00.

Dated at Jefferson City, Missouri, this 29 day of June, 1914.

HENRY LAMM,
*Chief Justice of the Supreme Court
of the State of Missouri.*

Filed in my office this 29 day of June, 1914.

J. D. ALLEN,
Clerk of Supreme Court of the State of Missouri.

[Endorsed:] Filed Jun- 29, 1914. J. D. Allen, Clerk.

9 In the Supreme Court of the State of Missouri, Division
Number Two.

No. 16439.

THE SCHNEIDER GRANITE COMPANY, a Corporation, Plaintiff and
Respondent,

v.

GAST REALTY & INVESTMENT COMPANY, a Corporation, and EMILY
GAST, Defendants and Appellants.

The above entitled cause coming on to be heard upon the petition of the appellant- therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, and upon examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be, and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioners be and the same is hereby approved, and that said Writ of Error and Bond shall act as a supersedeas and stay execution.

HENRY LAMM,

*Chief Justice of the Supreme Court
of the State of Missouri.*

[Endorsed:] Filed June 29, 1914. J. D. Allen, Clerk.

10 Know All Men by These Presents, That we, Gast Realty and Investment Company, a corporation, and Emily Gast, as principals and American Fidelity Company of Montpelier, Vermont, as sureties, are held and firmly bound unto The Schneider Granite Company, a corporation, in the full and just sum of Twenty-five Thousand (\$25,000) dollars, to be paid to the said Schneider Granite Company, or its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of June in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at the Supreme Court of Missouri in a suit depending in said Court, between Schneider Granite Company, a corporation, as Plaintiff, and Respondent against Gast Realty and Investment Company, a corporation, and Emily Gast as defendants and appellants, being cause number 16439 in said Supreme Court of Missouri, a final judgment was rendered against the said Gast Realty and Investment Company and Emily Gast and the said Gast Realty and Investment Company and Emily Gast having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to

the said Schneider Granite Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Gast Realty and Investment Company and Emily Gast shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

GAST REALTY & INVESTMENT CO. [SEAL.]

Per ALEX. GAST, *Prest.*

EMILY GAST, [SEAL.]

Per ALEX. GAST.

AMERICAN FIDELITY COMPANY. [SEAL.]

JOHN R. HARKINS, *Attorney in Fact.* [SEAL.]

Attest:

[SEAL.] MINNIE L. PINCUS,
Acting Secretary.

Sealed and delivered in presence of

11 STATE OF MISSOURI,
City of St. Louis, ss:

On this 29th day of June, 1914, before me personally appeared John R. Harkins who first being duly sworn, deposes and says that he is a- Attorney in Fact of the American Fidelity Company, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and that the said John R. Harkins acknowledged said instrument to be the free act and deed of said corporation, American Fidelity Company, by John R. Harkins, attorney in fact.

My commission expires March 24, 1918.

[SEAL.]

IDA C. SULZNER,
Notary Public.

12 STATE OF MISSOURI,
County of St. Louis, ss:

Upon this 29th day of June, 1914, before me personally appeared Alexander Gast, who first by me being duly sworn, deposes and says that he is the president of the Gast Realty & Investment Company, that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and the said Alexander Gast acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.]

M. W. HUTTON,
Notary Public.

My commission expires May 27, 1916.

I hereby approve the foregoing bond and sureties this 29 day of June, 1914.

HENRY LAMM,
*Chief Justice of the Supreme Court
of the State of Missouri.*

13 In the Supreme Court of the State of Missouri, Division
Number Two.

No. 16439.

THE SCHNEIDER GRANITE COMPANY, a Corporation, Plaintiff and
Respondent,

v.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Defendants and Appellants.

Now come the Gast Realty & Investment Company and Emily Gast, the above named defendants and appellants, and in connection with the petition for a writ of error herein, make the following assignment of errors which they aver occurred in the judgment of the Supreme Court of the State of Missouri, which said judgment was rendered by the Supreme Court of Missouri, and became final on the 23d day of June, 1914, and as and for said assignment of errors, they respectfully aver and say:

1. The Supreme Court of the State of Missouri erred in ordering that the judgment of the Circuit Court of the City of St. Louis should be affirmed.

2. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of section 14 of Article VI of the Charter of the City of St. Louis, are not repugnant to the Constitution of the United States.

3. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of Section 14 of Article VI of said Charter of the City of St. Louis, are not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

14 4. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of said section fourteen do not provide for the taking of property without due process of law, contrary to the provisions of said section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of said section fourteen do not deny to persons within the jurisdiction of the State of Missouri, and also to persons within the jurisdiction of the City of St. Louis, Missouri, and particularly such persons owning land in said City of St. Louis, including said above named defendants and appellants, the equal protection of the law.

6. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of said section fourteen are valid.

7. The Supreme Court of the State of Missouri erred in holding in said cause that the matters and things done under said section fourteen and complained of in this cause are not repugnant to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

8. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of Section 15 of Article VI of the Charter of the City of St. Louis and Sections 27 of Article VI of said Charter, are not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States; and erred in holding that the provisions of said section do not deprive the defendants and appellants of their property without due process of law; and that they do not deny — persons within the jurisdiction of the State of Missouri and also within the jurisdiction of the City of St. Louis, including the above named defendants and appellants, the equal
15 protection of the law, and the said Supreme Court of the State of Missouri erred in holding that the provisions of said section are valid.

9. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of Sections 15, 27 and 28 of Article VI of the Charter of the City of St. Louis, are not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States; and erred in holding that the provisions of said section do not provide for the taking of property without due process of law, contrary to the provisions of said Fourteenth Amendment and do not deny to persons within the jurisdiction of the State of Missouri, particularly to these defendants and appellants, the equal protection of the law; and the Court erred in holding that said provisions are valid.

10. The Supreme Court of the State of Missouri erred in holding that the provisions of Section 14 of Article VI of the Charter of City of St. Louis is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and erred in holding that the provisions of said section 14 of Article VI do not provide for the taking of property without due process of law, contrary to the provisions of said Amendment, and in holding said section does not deny to persons within the jurisdiction of the State of Missouri, including these defendants and appellants, the equal protection of the law; and, further, in holding that the provisions of said section are valid; and erred in holding that the provisions of said section are invalid in so far as they relate to the definition of the word "lot," and its provision as to what constitutes a lot, resulting in depriving
16 the defendants and appellants of their property without due process of law, in violation of Sections 20 and 30 of Article II of the Constitution of the State of Missouri:

Wherefore the said Gast Realty & Investment Company and Emily Gast pray that said judgment of the Supreme Court of the State of Missouri, may be reversed, annulled and altogether for naught held

and that they may be restored to all things which they have lost by reason of said judgment of the Supreme Court of the State of Missouri.

GAST REALTY AND INVESTMENT CO. AND
EMILY GAST,

Appellants.

By JOHNSON, RUTLEDGE & LASHLY,
THOMAS G. RUTLEDGE,

Their Attorneys.

[Endorsed:] Filed Jun- 29, 1914. J. D. Allen, clerk.

17 UNITED STATES OF AMERICA, ss:

To Schneider Granite Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Missouri, in cause No. 16439, pending in said Court wherein Gast Realty & Investment Company, and Emily Gast are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, this 29th day of June, in the year of our Lord one thousand nine hundred and fourteen.

HENRY LAMM,

Chief Justice of the Supreme Court of Missouri.

UNITED STATES OF AMERICA,

State of Missouri, ss:

Due service of the above and foregoing citation is hereby acknowledged and accepted this 30th day of June, 1914, for and on behalf of the aforesaid Schneider Granite Company, defendant in error in the above entitled cause.

HICKMAN P. RODGERS,

Attorney for Schneider Granite Company,

Defendant in Error.

[Endorsed:] Filed Jul- 1, 1914. J. D. Allen, clerk. Filed Jul- 1, 1914. J. D. Allen, clerk.

17½ In the Supreme Court of Missouri. April Term, 1914,
Div. No. 2.

Be it remembered that on March 27, 1911, there was filed in the office of the Clerk of this Court, a duly certified copy of a judgment of the Circuit Court of the City of St. Louis, and an order allowing

appeal to this Court, in a certain cause wherein Schneider Granite Company was Plaintiff-Respondent and Gast Realty & Investment Company and Emily Gast were Defendants-Appellants, which said judgment and order allowing appeal is in words and figures as follows, to-wit:

18 STATE OF MISSOURI,
 City of St. Louis, ss:

Be it remembered, that heretofore, to-wit: at the October Term, Nineteen Hundred and Ten, of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the twenty-third day of November, 1910, it being the Thirty-first day of the said October Term, 1910, of said Court, the following proceedings were had in cause No. 65020, Series A., of the causes in said Court, wherein Schneider Granite Company, is plaintiff, and Gast Realty & Investment Company and Emily Gast are defendants, to-wit:

WEDNESDAY, November 23rd, 1910.

65020 A.

SCHNEIDER GRANITE COMPANY
vs.

GAST REALTY AND INVESTMENT COMPANY and EMILY GAST.

Now at this day this cause coming on for hearing, plaintiff appearing by Hickman P. Rodgers, its counsel, and defendants appearing by Messrs. Johnson, Houts, Marlatt & Hawes, their counsel, the cause is taken as submitted on the pleadings and proof adduced: and the Court being fully advised in the premises doth find the issues herein joined in favor of plaintiff: Wherefore it is considered and adjudged by the Court that plaintiff recover herein the sum of sixteen thousand seven hundred and thirteen and 74/100 dollars (\$16,713.74), (being the amount of the special tax bill mentioned in the amended petition and accrued interest thereon from March 3rd, 1909 to this day at the rate of eight per cent per annum) and that the same, together with interest thereon from the date hereof at the rate of six per cent per annum and the costs of this suit be charged as a lien against and levied of the real

19 estate mentioned in said amended petition, lying being and situate in the City of St. Louis, State of Missouri, and described as follows, to-wit: A tract of land in U. S. Survey 1927 and 728, Vol. 1. 48, formerly page 64, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran Avenue and running thence westwardly parallel with and 132.50 feet north of the north line of McLaran Avenue 115 feet to the public alley in C. B. 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125

feet, thence westwardly along the north line of said property 30 feet, thence southwardly along the west line of said property 125 feet to the north line of alley in C. B. 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property 135 feet, thence westwardly along the north line of said property 101.53 feet to the midway line between Broadway and Church Road, thence northwardly along said midway line 205.02 feet to the south line of Bellevue Addition 70.78 feet to the east line of said Addition, thence northwardly along the east line of said Addition 445.69 feet to the south line of Hornsby Avenue, thence eastwardly along the south line of Hornsby Avenue 418.92 feet to the west line of Broadway, thence southwardly along the west line of Broadway 1083.88 feet to place of beginning; and that execution issue therefor.

Draft filed.

And at the December Term, 1910, and on the Sixteenth day of December, 1910, it being the Tenth day of the said December Term, 1910, of said Court, the following further proceedings were had in said cause, to-wit:

20

FRIDAY, December 16th 1910.

65020 A.

SCHNEIDER GRANITE COMPANY

vs.

GAST REALTY AND INVESTMENT COMPANY and EMILY GAST.

Now at this day comes the plaintiff by attorney and voluntarily remits the sum of One Hundred ninety three and 62/100 dollars of the judgment for Sixteen thousand seven hundred thirteen and 74/100 dollars, entered herein, on the 23rd day of November, 1910, leaving said judgment stand for the residue thereof, to-wit: the sum of Sixteen thousand five hundred twenty and 12/100 dollars.

Wherefore it is considered and adjudged by the Court, that the plaintiff is entitled to recover the sum of Sixteen thousand five hundred twenty and 12/100 dollars, and also its costs herein expended, to be levied out of the property described in the special tax bill and petition herein, and being situated in the City of St. Louis, Missouri, as follows, to-wit: A tract of land in U. S. Survey 1927 and 728, Vol. 1, 48, formerly page 64, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran Avenue and running thence westwardly parallel with and 132.50 feet north of the north line of McLaran Avenue 115 feet to the public alley in C. B. 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet,

thence southwardly along the west line of said property 125 feet to the north line of alley in C. B. 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property 435 feet, thence westwardly along the north line of said property 101.53 feet to the midway line between
 21 Broadway and Church Road, thence northwardly along said midway line 205.02 feet to the south line of Bellevue Addition, thence eastwardly along said south line of Bellevue Addition 70.78 feet to the east line of said addition, thence northwardly along the east line of said Addition 445.69 feet to the south line of Hornsby Avenue, thence eastwardly along the south line of Hornsby Avenue 418.92 feet to the west line of Broadway, thence southwardly along the west line of Broadway 1083.88 feet to the place of beginning; and that execution issue therefor and that this judgment shall be and constitute a special judgment against the hereinabove described tract of ground, and that said land *to* sold to satisfy the same, according to law, and that execution issue in conformity with this judgment.

FRIDAY, February 3rd, 1911.

65020 A.

SCHNEIDER GRANITE COMPANY

vs.

GAST REALTY AND INVESTMENT COMPANY et al.

On motion of defendants, by attorney, and for good cause shown, it is ordered by the court that they be allowed sixty days time from and after this date within which to file their bill of exceptions herein and ten days after the December Term, 1910, of this Court to file its appeal bond herein in the sum of Sixteen Thousand (\$16,000.00) dollars.

Thereupon said defendants deposit Ten (\$10.00) dollars docket fee herein, as required by law and file herein an affidavit for appeal, and on motion it is ordered by the Court that said defendants be and are hereby allowed an appeal to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered herein.

22 STATE OF MISSOURI,
City of St. Louis, ss:

I, Chas. R. Graves, Clerk of the Circuit Court, City of St. Louis, with- and for the City and State aforesaid, do hereby certify that the above and foregoing is a full, true and complete transcript of the Judgment in the above entitled cause; showing the term, day of the term, month and year in which the same was rendered, and also of the order granting an appeal in said cause, as fully as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand, and affixed

the seal of said court, at office, in the City of St. Louis, this third day of March, 1911.

[SEAL.]

CHAS. R. GRAVES,
Clerk Circuit Court.

22½ In the Supreme Court of Missouri, April Term 1914,
Div. No. 2.

And thereafter, to-wit, on September 26th, 1914, the Appellant filed its Abstract of the Record, in said cause, which said Abstract of the Record is in words and figures as follows:

23 In the Supreme Court of Missouri, Division No. 2, October
Term, 1913.

No. 16439.

THE SCHNEIDER GRANITE COMPANY, a Corporation, Respondent,
vs.
GAST REALTY & INVESTMENT COMPANY, a Corporation, and EMILY
GAST, Appellants.

Appeal from the Circuit Court, City of St. Louis, Hon. Daniel D.
Fisher, Judge.

Appellants' Abstract of the Record.

The petition in this case, No. 65020, was filed with the Clerk of the Circuit Court of the City of St. Louis, Missouri, on the 21st day of February, 1910, wherein the Schneider Granite Company is plaintiff, and summons was duly issued thereon, returnable to the April Term, 1910, of said court; and thereafter, on the 25th day of February, 1910, service was duly had by the Sheriff on the Gast Realty & Investment Company, and on the 28th day of February, 1910, on Emily Gast, and the writs were returned duly executed by the Sheriff.

On the 3d day of March, 1910, plaintiff filed its exhibit marked "A," a copy of which exhibit is attached to this abstract as part hereof, opposite page —.

Thereafter, on the 7th day of April, 1910, by leave of Court first had and obtained, plaintiff filed its amended petition in words and figures as follows (omitting caption):

Amended Petition.

Now comes plaintiff in the above-entitled cause, and leave of Court first had and obtained, files this amended petition.

Plaintiff for cause of action states that plaintiff and defendant Gast Realty & Investment Company are now and at the times here-

inafter mentioned were corporations duly organized under the laws of the State of Missouri.

Plaintiff further says that at the times hereinafter mentioned, and until the 4th day of March, 1909, when it conveyed a portion of same to defendant Emily Gast, defendant Gast Realty & Investment Company was the owner of real estate lying, being and situate in the City of St. Louis, State of Missouri, and described as follows, to-wit: A tract of land in U. S. Survey 1927 and 728, Vol. 1, 48, formerly page 64, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran avenue and running thence westwardly parallel with and 132.50 feet north of the north line of McLaran avenue 115 feet to the public alley in C. B. 5209, thence northwardly along the east line of said alley 7.50 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet, thence southwardly along the west line of said property 125 feet to the north line of alley in C. B. 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Leudinghaus, thence northwardly along the east line of said property 435 feet, thence westwardly along the north line of said property 101.53 feet to the midway line between Broadway and Church Road, thence northwardly along said midway line 205.02 feet to the south line of Bellevue Addition, thence eastwardly along said south line of Bellevue Addition 70.78 feet to the east line of said addition, thence northwardly along the east line of said addition 445.69 feet to the south line of Hornsby avenue, thence eastwardly along the south line of Hornsby avenue 418.92 feet to the west line of Broadway, thence southwardly along the west line of Broadway 1083.88 feet to the place of beginning.

Plaintiff further says that said City of St. Louis, by authority of its charter and ordinance No. 23,137, then in force, entered into a written contract with plaintiff, which contract was numbered 8105, for work of improvement of one of the public streets of said city, to-wit, Broadway, between a line about 285 feet south of Pelham avenue and Hornsby avenue, by grading, preparing the roadbed or ground for superstructure, setting new curbing, laying a roadway pavement of granite blocks on concrete, and making all proper connections and intersections with other streets and alleys; and that said ordinance described the materials to be used and the manner in which said work should be done.

Plaintiff further says that it afterwards entered upon the performance of the work by said contract and ordinance contemplated and fully performed same in accordance therewith, and when same was fully completed the total cost thereof was duly computed and the proper proportion thereof was duly assessed as a special tax, as by law directed, against the property above described, and that a special tax bill dated February 8th, 1909, in the sum of \$14,522.65, against defendant Gast Realty & Investment Company, as owner of said ground, was duly made out, registered, certified,

signed and countersigned by the proper officers of said city and delivered to plaintiff who is now and ever since has been the owner thereof; and that afterwards, on, to-wit, the 17th day of December, 1909, said special tax bill was duly amended so as to more fully describe the property charged and make the description in said tax bill to read substantially as heretofore set out in this petition, and by inserting therein as additional owner of said property the name of the defendant, Emily Gast; that said special tax bill, which is numbered 17,961, filed herewith and marked Exhibit "A," is by virtue of the premises and by the provisions of the charter and ordinances of said city a first lien against the ground above described.

And plaintiff further avers that said special tax bill was made payable in seven installments and that notice of the issuance thereof was duly given defendant on the 3rd day of March, 1909, but that no installment or portion of said tax bill has ever been paid.

Wherefore, plaintiff prays judgement for said sum of \$14,522.65, with interest thereon at the rate of 8 per cent per annum from said 3rd day of March, 1909, and for its costs; and that the same be declared a special lien against the foregoing real estate which is also described in said special tax bill; and that said property be sold to satisfy said sum, interest and costs.

HICKMAN P. RODGERS,

Attorney for Plaintiff.

Thereafter, on the 28th day of May, 1910, one of the days of the April Term, 1910, defendant Gast Realty & Investment Company filed, by consent, its amended answer, which is in words and figures as follows (omitting caption):

Amended Answer.

Now comes defendant, Gast Realty & Investment Company, and by leave of Court first had and obtained, files this its separate amended answer to the amended petition of plaintiff herein.

And for such amended answer this defendant admits that the plaintiff and defendant are now and at all times mentioned in the petition were corporations duly organized under the laws of the State of Missouri.

Defendant further admits that at all times mentioned in the said petition until the 24th day of November, 1908, this defendant, Gast Realty & Investment Company, was the owner of real estate lying, being and situate in the City of St. Louis, State of Missouri, and described as follows, to-wit:

A tract of land in U. S. Survey 1927 and 728, Vol. 1, 48, formerly page 64, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran avenue and running thence westwardly parallel with and 132.50 feet north of the north line of McLaran avenue, 115 feet to the public alley in C. B. 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann,

thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet, thence southwardly along the west line of said property 125 feet to the north line of alley in C. B. 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property 435 feet, thence westwardly along the north line of said property 101.53 feet to a midway line between Broadway and Church Road, thence northwardly along said midway line 205.02 feet to the south line of Bellevue Addition, thence eastwardly along said south line of Bellevue Addition 70.78 feet to the east line of said addition, thence northwardly along the east line of said addition 445.69 feet to the south line of Hornsby avenue, thence eastwardly along the south line of Hornsby avenue 418.92 feet to the west line of Broadway, thence southwardly along the west line of Broadway 1083.88 feet to the place of beginning.

And that said midway line is the line mentioned and referred to as the western boundary line of the benefit district hereinafter mentioned.

And defendant states that since November 24, 1908, Emily Gast has been the owner of a tract of land being a part of the above-described tract, having a front of 50 feet on the west line of Broadway by a depth of 125 feet, the south line of said tract being
29 215 feet north of and parallel with the north line of McLaran avenue; that defendant has been since said date the owner of all the balance of said property.

Defendant further admits that the Municipal Assembly of the City of St. Louis, on or about the 24th day of July, 1907, undertook to enact the ordinance mentioned and referred to in said amended petition, the same being No. 23,137.

This defendant further admits that the City of St. Louis entered into a contract with the plaintiff, known as No. 8105, for the performance of the work provided for by said alleged ordinance, and this defendant further admits that the plaintiff did thereafter enter upon the performance of said alleged contract and the work thereby provided for, and admits that plaintiff performed and completed said work; also that when said work was completed, the total cost thereof was computed.

And this defendant further admits that thereafter the President of the Board of Public Improvements of said city did attempt to levy and assess special taxes against certain property for a portion of the cost of said work, and that the said President of the Board of Public Improvements did make out, register, certify and sign an alleged special tax bill No. 17,961, dated February 8, 1909, and that the same was for the sum of \$14,522.65 against the defendant, Gast Realty & Investment Company, and that said tax bill was delivered to plaintiff; but this defendant denies that said alleged special taxes were levied or assessed in the manner required by law, and denies that said alleged special tax bill No. 17,961 was made out in the manner required by law, and denies that said sum, or any part thereof, was chargeable against

30 any realty described in the petition herein, and denies that said alleged special tax bill No. 17,961 was chargeable against said realty, and denies that said sum, or any part thereof, or said alleged special tax bill No. 17,961 was or is a lien against said above-described realty, and denies that said alleged special tax bill No. 17,961 was or is valid.

This defendant denies each and every other allegation in said petition made and contained.

And for its first affirmative defense to said petition defendant states that the aforesaid alleged ordinance provided for the improvement of a public street in the City of St. Louis, known as Broadway, between a line about 285 feet south of Pelham avenue and Hornsby avenue; that said Broadway is and was at all times mentioned in the amended petition a public street in said city, 80 feet wide, running northwardly and southwardly; that Hall's Ferry road is and was at all times mentioned in said amended petition a public street, running in a northwesterly and southeasterly direction and connecting with and opening into Broadway on its west line and running northwest therefrom but not crossing Broadway nor continuing beyond the west line thereof; the center line of said Hall's Ferry road, at its junction with Broadway, being about 285 feet south of the south line of the intersection of Pelham avenue and Broadway, and being the southern terminus of the improvement provided for by said alleged ordinance; that Walter avenue is and was at all times mentioned in said amended petition the next street north of Hall's Ferry road on the west side of Broadway, and said Walter avenue is 50 feet wide, running in a northwesterly and southeasterly direction, connecting with and opening into Broadway on its west line but not crossing Broadway, the south line of said Walter avenue, at its intersection with Broadway, being about 367.72

31 feet north of the intersection of Hall's Ferry road and Broadway; that the next street north of Walter avenue on the west side of Broadway is McLaran avenue, a public street 60 feet wide, running in an easterly and westerly direction and opening into and connecting with Broadway on the west line of Broadway but not crossing Broadway; that Gimblin street is and was at all times mentioned in the amended petition herein a public street, running in a north-easterly and southwesterly direction, 30 feet wide, and opening into and connecting with Broadway at the intersection of Broadway and McLaran avenue; that the intersection of Broadway, McLaran avenue and Gimblin street is about 433.96 feet north of the north line of Walter avenue at its intersection with the west line of Broadway; that at the time of the passage of the ordinance referred to in the petition there were no public streets opening into or connecting with Broadway on its west line, from the north of McLaran avenue to the south line of Hornsby avenue; that at the time said ordinance was passed the said Hornsby avenue was a public street, 40 feet wide, the south line of which was about 1514 feet north of the north line of McLaran avenue; that said Hornsby avenue opened into and connected with Broadway on its west line but did not cross Broadway; that from its intersection with Broadway Hornsby avenue ran

in a southwesterly direction about 840 feet, and then turned south and ran nearly parallel to Broadway about 150 feet, where it connected with Hornsby avenue as established in a subdivision known as Walter place; that subsequent to the passage of said ordinance No.

- 23,137 the said portion of said Hornsby avenue above described running southwestwardly and southwardly from the intersection of Broadway to the junction of said Hornsby avenue with Hornsby avenue as established in the subdivision known as Walter place, was vacated by an ordinance of the City of St. Louis, and a strip of ground 60 feet wide, extending from the west line of Broadway to Hornsby avenue as established in said subdivision known as Walter place, was dedicated to public use as a public highway, the south line of said strip of ground being 11 feet south of and parallel to the prolongation eastwardly of the south line of Hornsby avenue in said Walter place; said south line of said strip so dedicated and now known as Hornsby avenue being 1216.38 feet north of the north line of McLaran avenue. And defendant states that Church road is and was at all times mentioned in the amended petition of plaintiff herein a public street, 60 feet wide, running in a general north and south direction; that the east line of said Church road, where it intersects with the north line of McLaran avenue, is 845.32 feet west of the west line of Broadway, and the east line of said Church road, where it intersects with the south line of Hornsby avenue, is about 980 feet west of the west line of Broadway; that between Hornsby avenue and McLaran avenue there are no streets opening into or connecting with Church road on the east; that Church road, at the time ordinance No. 23,137 was passed, did not cross Hornsby avenue; that between Broadway and Church road there were, at the times mentioned in plaintiff's amended petition, and are no streets running in a northerly and southerly direction, and that the large area of land bounded by Broadway on the east, Church road on the west, McLaran avenue on the south and
- 33 Hornsby avenue (as at present constituted) on the north was not at said times and is not subdivided by any cross streets in any direction.

Defendant states that Pelham avenue is and was at all times mentioned in the amended petition herein a public street in the City of St. Louis, 50 feet wide, opening into and connecting with Broadway on the east, running in a northwesterly and southeasterly direction but not crossing Broadway; that the next street north of Pelham avenue on the east side of Broadway is and was at all times mentioned in said petition Gimblin road, which is and was at all said times a public street, 30 feet wide, running in a northeasterly and southwesterly direction, the south line of Gimblin road being, at its intersection with Broadway, about 695.25 feet north of the north line of Pelham avenue at its intersection with Broadway; that the next public street north of Gimblin road on the east side of Broadway is and was at all times mentioned in the amended petition Doddridge avenue the south line of which, at its intersection with Broadway is, and was at all said times about 673.71 feet north of the north line of Gimblin road at its intersection with Broadway; that there are and

were at all said times no other streets opening into or connecting with Broadway on the east side south of the north terminus of the improvement provided for in ordinance 23,137; that the said north terminus of said improvement is about 696.9 feet north of the north line of Doddridge avenue at its intersection with Broadway.

Defendant states that Lowell street is and was at all times mentioned in the amended petition a public street, 60 feet in
34 width, running from a point north of the terminus of the improvement provided for by ordinance No. 23,137 to an intersection with Gimblin road, crossing Doddridge avenue; that said Lowell street is and was at all said times parallel to the east line of Broadway, and is and was at all said times the next street east of Broadway and is and was about 340 feet east of Broadway; that midway between Broadway and Lowell street an alley, 20 feet wide, runs and did at all said times run from the northern terminus of the improvement provided by ordinance 23,137 to the north line of Gimblin road; the west line of said alley being about 160 feet east of the east line of Broadway; that between Gimblin road and Pelham avenue at all said times were lots H and I of subdivision of the Gimblin estate, which are and were regularly platted lots, as shown by plat filed in deed book 158, pp. 434-435, of the City of St. Louis, both of which lots front on Broadway; that said lot H has and at all said times had a front on Broadway of 695 feet 3½ inches, a depth on the north line of 1011 feet 7 inches, and on the south line of 1422 feet 9¼ inches, with a width in the rear of 474 feet 6½ inches; that said lot I has and at all said times had a front on Broadway of 68 feet 3½ inches, by a depth on the north line of 1422 feet 9¼ inches, and a width in the rear of 371 feet 7 inches.

Defendant states that in locating and establishing the benefit district hereinafter mentioned and referred to, said City of St. Louis and said President of the Board of Public Improvements of said city treated Lowell avenue as the next parallel street to Broadway on the east side of Broadway from the northern terminus of the improvement provided for by ordinance 23,137 to the north line of Gimblin road, and treated Church road as the next parallel or
35 converging street to Broadway on the west side of Broadway from the north line of McLaran avenue to a point directly west of the north terminus of said improvement.

And defendant states that the said City of St. Louis and said President of the Board of Public Improvements, after ascertaining the cost of the aforesaid improvement, attempted to levy ¼ of said cost upon all the property fronting upon or adjoining the said improvement in the proportion that the frontage of each lot or tract so fronting or adjoining bore to the total aggregate of frontage of all lots or parcels of ground fronting upon or adjoining said improvement, and the remaining ¾ of the cost they attempted to assess upon all the property in the district defined and bounded as hereinafter set forth in the proportion that the area of each lot or parcel of ground (or the part of such parcel of ground lying within the district) bore to the total area of the district exclusive of streets or alleys.

And defendant states that the aforesaid district was defined and

bounded and established as follows: On the west side of Broadway a line was drawn beginning on the west line of Broadway, in city block 4279, 120.24 feet north of the intersection of Broadway and Hall's Ferry road, thence in a westerly direction 29.9 feet to a point midway between Hall's Ferry road and Broadway; thence in an irregular line midway between said streets to a point 38.28 feet from South Market street and thence to the intersection of the west line of Broadway and the south line of Walter street; then beginning at the intersection of the west line of Broadway with the north line of Walter street, the line included the whole of city block 4278; then beginning at the intersection of the west line of Broadway with the north line of McLaran avenue, a line was drawn along the

36 north line of McLaran avenue to a point 422.68 feet west of the west line of Broadway, thence running in a northerly direction to a point in the south line of Bellevue addition, 70.78 feet west of the east line of said Bellevue addition, thence north to a point immediately west of the north terminus of the improvement provided for in ordinance 23,137, 490.73 feet west of the west line of Broadway, thence east to the west line of Broadway.

On the east side of Broadway the benefit district began at a point in the east line of Broadway where the improvement provided for by ordinance 23,137 commenced, and a line was drawn in a northeasterly direction parallel to the north line of lot 11 of city block 4294 to the west line of alley in said block, thence along the west line of said alley in city block 4294 and 4293 to the north line of Gimblin road; on the south line of Gimblin road, beginning at a point in the said south line of Gimblin road 322.80 feet northeast of the east line of Broadway, the line ran thence parallel to Broadway at a perpendicular distance of 240.83 feet from Broadway, 818.38 feet to a point 257.76 feet northeast of the intersection of the north line of Pelham avenue with the east line of Broadway, thence to the intersection of the said north line of Pelham avenue with the east line of Broadway; then beginning at the intersection of the south line of Pelham avenue with the east line of Broadway, the line ran 213.22 feet along the south line of Pelham avenue, thence 190.22 feet to a point in the east line of Broadway 285.52 feet south of the intersection of the south line of Pelham avenue with the east line of Broadway.

And defendant states that plats are herewith filed, marked "Exhibits A and B, to the Answer of Defendants," and made

37 parts thereof, which plats correctly show the location of the streets, alleys, blocks, lots and properties hereinbefore mentioned, and also show the location of defendant's property and of all of the property included within the alleged benefit district.

And defendant states that the tract of ground described and set out in plaintiff's amended petition is and was at all the times in said petition stated a part of an undivided tract of ground, all of which belonged and now belongs to defendant, Gas Realty and Investment Company, except the tract of land 50 feet wide and 125 feet in depth heretofore described belonging to Emily Gast; that said large tract

of land contains approximately 16 acres of land, and is described as follows, to-wit:

A tract of land in United States Survey 1927 and 728, Vol. 1, 48, formerly page 64, and in city block 4282, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran avenue, running thence westwardly parallel with and 132.50 feet north of the north line of McLaran avenue 115 feet to the public alley in city block 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet; thence southwardly along the west line of said property 125 feet to the north line of alley in city block 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property of Luedinghaus 435 feet, thence westwardly along the north line of said property of said Luedinghaus 437 feet 1¼ inches to the east line of an alley, thence north along the east line of said alley 233.12 feet to the south line of Bellevue Addition, thence north about 450 feet to the south line of Hornsby avenue, thence east about 928 feet to the west line of Broadway, thence south about 1084 feet to the place of beginning.

And defendant states that no part of said above-described large tract of ground has ever been platted or divided into lots or blocks.

And defendant states that the area bounded on the west by Broadway, on the east by Lowell street, on the south by Doddridge street, comprises city block 4294, and is divided and platted into lots; that the area bounded on the west by Broadway, on the east by Lowell avenue, on the north by Doddridge street, and on the south by Gimblin road, comprises city block 4293, and is platted and divided into lots; that the space bounded on the west by Broadway, on the north by Gimblin road, and on the south by Pelham avenue, comprises lots H and I of the subdivision of the Gimblin estate, which lots are regularly platted and subdivided lots fronting on Broadway; that the area contained between Hall's Ferry road, Broadway, Walter street and South Market street, comprises city block No. 4279, and is divided and platted into city lots; that the area bounded on the east by Broadway, on the southwest by Walter avenue, on the northwest by Gimblin avenue, comprises city block 4278, and is regularly divided and platted into city lots; that the property south and west of defendant's property is divided into blocks known as city blocks 5209 and 5253, and is regularly divided and platted into city lots.

Defendant states that the said attempted assessment of \$14,522.65 against defendant's property described in plaintiff's amended petition is illegal and invalid and that the said alleged special tax bill issued upon said alleged assessment and evidencing the same is illegal and invalid and vastly in excess of the amount which should be assessed against defendant's property, or any part thereof, for the work done on Broadway as alleged in plaintiff's

amended petition; that said amount of said alleged special tax bill has been assessed against a large part of defendant's said property which is not liable to assessment for the work aforesaid, and in this respect defendant says that the action of said Board of Public Improvements in including within the said assessment district all of defendant's property described in plaintiff's amended petition is without warrant of law, illegal and void; and that said assessment is contrary to Section 14 of Article VI of the Charter of the City of St. Louis, and is without warrant of law and is void, in this: That by the terms of said Section 14 of Article VI of the Charter of the City of St. Louis it is provided that if there is no parallel or converging street on one side of the street to be improved, then the district line on such side of the street to be improved shall be drawn at the average distance off the opposite district line; and defendant states that Church road is not and was not, within the meaning of the Charter of said City of St. Louis, the nearest parallel or converging street to said Broadway on the west of said Broadway; that on the west of said Broadway there is not and was not at any of the times mentioned in said amended petition any parallel or converging street to said Broadway within the meaning of said Charter, and that the benefit area district line on the west of Broadway
40 should have been drawn across this defendant's property at a distance west of Broadway equal to the average distance of the opposite district line on the east side of Broadway.

And defendant states that the property of defendant above described will, in the natural course of events, be cut into city blocks by opening streets running east and west and north and south through said large undivided area; that immediately north of the property of defendant described in the amended petition is an open public street, known as Jordan street, which runs north and south parallel to Broadway, and which, if extended south, would divide the tract of land of defendant herein referred to into blocks, and that eventually, in the future, three public streets will be extended in a north and south direction through defendant's said property and one or more streets in an east and west direction, all of which streets will have to be improved at the expense of defendant's property.

And this defendant states that if said Section 14 of Article VI of the Charter of the City of St. Louis be so construed as to include within the benefit district for the improvement of said Broadway the said property of the defendant described in plaintiff's amended petition, then said Section 14 of Article VI of said Charter is illegal and void, in that said section of said Charter, is so construed, would impose grossly unequal, unfair and inequitable burdens upon that part of defendant's above-described property west of a line drawn across this defendant's property at a distance west from Broadway equal to the average distance of the opposite district line from said Broadway on the east side thereof; and, if so construed and enforced, would deprive the defendant of the equal protection of the
41 laws and deprive defendant of its property without due process of law, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States, and contrary to

Section 20 of Article II of the Constitution of Missouri, and contrary to Section 30 of Article II of the Constitution of Missouri.

And further answering this defendant states that the said benefit district so extended and fixed by the City of St. Louis and the President of the Board of Public Improvements was illegal and improper and not in conformity with the provisions of the Charter of the City of St. Louis and the existing law, in this: That Section 14 of Article VI of said Charter provides that, if the property adjoining a street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. And defendant states that lots H and I of the subdivision of Gimblin's estate are lots as shown by recorded plats of additions or subdivisions fronting on Broadway and lying between Gimblin road and Pelham avenue; that in defining, bounding and establishing the said benefit district, the City of St. Louis and the President of the Board of Public Improvements should have drawn the district line on the east side of Broadway so as to include the entire depth of said lots H and I so fronting on Broadway; and defendant states that, in failing to include the entire depth of said lots H and I and in establishing the east line of the benefit district on the east side of Broadway at a distance of only 240.83 feet east of Broadway for a distance of 818.38 feet south of Gimblin road, the said City of St. Louis and the President of the Board of Public Improvements erroneously interpreted the Charter and the

42 law, and that thereby the benefit district as established was made illegal and void and all the tax bills issued on all of the property included in said illegal and erroneously established benefit district, and especially the tax bill issued against defendant's property, were illegal and void.

And, further answering, defendant states that said benefit district, so established by the City of St. Louis and the President of the Board of Public Improvements, was erroneous, illegal and not in conformity with the Charter of the City of St. Louis and the existing law, in this: That at the time the said ordinance No. 23,137 was enacted a portion of Hornsby avenue (as then constituted) ran parallel or nearly parallel to Broadway at a point about 155 feet $\frac{1}{4}$ inch east of the east building line of Church road; said portion of said Hornsby avenue being north of the north line of Hornsby avenue as established in subdivision known as Walter Place; that at the time said ordinance was passed said Church road did not extend north of Hornsby avenue as established in subdivision known as Walter Place; but defendant states that, in establishing the benefit district herein referred to, the City of St. Louis and the President of the Board of Public Improvements disregarded that portion of Hornsby avenue which, at the time ordinance No. 23,137 was passed, was parallel to Broadway and east of Church road, and took as the next parallel or converging street to Broadway north of Hornsby road (as established in the subdivision known as Walter Place) the said Church road; and defendant states that as to that portion of the said benefit district which lies north of Hornsby avenue as at present constituted, including the property of defendant described

43 in plaintiff's amended petition, Church road could not have been the next parallel or converging street, because said portion of said Hornsby Avenue was parallel to Broadway and nearer to Broadway than Church road, and because at the time said ordinance 23,137 was passed Church road did not cross or extend north of Hornsby avenue as established in the subdivision known as Walter Place; and defendant states that said City of St. Louis and said President of the Board of Public Improvements included in the property to be assessed for said improvements a part of the property which constituted a public street at the time said ordinance No. 23,137 was enacted; and defendant states that in so establishing and bounding said benefit district and in assessing taxes against property which constituted a public street when the ordinance was passed, the said City of St. Louis and the President of the Board of Public Improvements erroneously interpreted the Charter and the existing law and illegally established said district, by reason of which the tax bills against all the property in said illegally established district were rendered illegal and void, and especially the tax bill against the property of defendant herein.

And, further answering, defendant states that all the tax bills issued against the property in said benefit district, and especially against the property of defendant mentioned in plaintiff's amended petition are illegal and void for the following reason: Ordinance No. 23,137, in compliance with which plaintiff alleges its contract was made and under authority of which the alleged special tax bills above referred to were issued, specified, in accordance with Section 15 of Article VI of the Charter of the City of St. Louis, the
44 fund out of which the cost of said improvement should be paid and provided by section 4 thereof, as follows:

"The total cost of the foregoing work and all proper connections and intersections required (except so much thereof as the railway company having tracks on said street is by law obligated to pay, and except, further, so much thereof as is provided to be paid by the City of St. Louis by section 5 of this ordinance) shall be ascertained and be levied and assessed as a special tax upon all the property within a district defined and bounded by Section 14 of Article VI of the Charter of the City of St. Louis."

And defendant states that by section 5 of said ordinance it was provided that the proportion of the cost of the improvement of said Broadway which should be borne by the City of St. Louis amounted to \$17,168.00, and said section 5 appropriated said sum of \$17,168.00 to pay for the city's proportion of said improvements; that said section 5 of said ordinance is as follows:

"Section 5. Whereas, In the district aforesaid there is located St. Louis Water Works property of the City of St. Louis which is not liable to special assessment, and, whereas, the proportion of cost of the aforesaid improvement which would have been assessed against said property of the city were it not exempt from the assessment amounts to \$17,168.00. There is hereby appropriated and set apart out of real estate account for city's proportion of cost against property of the city for reconstructing and improving streets, alleys or

sidewalks said sum of \$17,168.00 to pay for the city's proportion of said cost."

45 And defendant states that under the provisions of said ordinance the amount of \$17,168.00 should have been deducted from the total cost of the improvement on Broadway before the remainder of the cost was taxed against the property in said district according to its frontage and area, but defendant states that the City of St. Louis and the President of the Board of Public Improvements, in ascertaining the amount of the tax against the properties in the benefit district aforesaid, wholly disregarded the provisions of said ordinance, and instead of applying said sum of \$17,168.00 to the payment of the city's proportion of the cost of said improvement, said City of St. Louis and said President of the Board of Public Improvements only applied \$7,947.78 to the payment of the city's proportion of the cost of said improvements and attempted to tax the difference between the total cost and \$7,974.78 against the property in said benefit district.

And defendant states that in so disregarding the said provisions of said ordinance, the said city and President of the Board of Public Improvements acted illegally and wrongfully and that all the tax bills issued against the property in said benefit district, including the alleged tax bill issued against the property of this defendant and referred to in the amended petition of plaintiff, were thereby rendered illegal and void.

And, further answering, defendant states that the assessments of alleged special taxes and alleged tax bills against the property in the benefit district herein referred to are illegal and void for the following reason: That the contract which the plaintiff herein entered into with the City of St. Louis, for the performance of work

46 on Broadway, referred to in plaintiff's amended petition, was entered into under and in pursuance of the terms and provisions of the said ordinance No. 23,137, and especially of sections 4 and 5 of said ordinance; that said ordinance as above alleged provided that the city should pay, out of the total cost of said improvements, the sum of \$17,168.00, and that the property in the benefit district, exclusive of the city's property, should only be charged with the difference between the total cost of the improvement and \$17,168.00. And defendant states that the contract which the plaintiff made with the City of St. Louis, made under the terms of said ordinance 23,137, provided that the property in the benefit district, exclusive of the property belonging to the city, should only be charged with the difference between the total cost of said improvement and the sum of \$17,168.00, and provided that the City of St. Louis should pay to the said plaintiff, contractor, the said sum of \$17,168.00, but plaintiff states that the City of St. Louis and the President of the Board of Public Improvements wholly disregarded, in assessing the special taxes against the property in the benefit district for the improvement of Broadway, the provisions of said ordinance and the provisions of said contract, and failed to deduct from the total cost of the said improvement, to-wit, \$42,291.52, the said sum of \$17,168.00 before assessing the balance against the property in said benefit district, exclusive of the city's property;

and defendant states that plaintiff is estopped by reason of the provisions of ordinance 23,137 under which it claims, and by reason of the terms of its contract with the City of St. Louis, to claim that special tax bills could be issued by the City of St. Louis and the President of the Board of Public Improvements for more than the difference between \$42,291.52 and \$17,168.00. And defendant states that by reason of such improper and illegal action, the said tax bills and especially the alleged tax bill against the property of this defendant mentioned in the amended petition of plaintiff are illegal and void.

And, further answering, defendant states that said alleged special tax bill No. 17,961, dated February 8, 1909, was illegal, invalid and void for the reason that it did not describe, with sufficient certainty, the property against which it purported to be issued; that the said description contained in said pretended special tax bill was wholly insufficient to make it a charge upon any real estate, and particularly against the property described in the amended petition of plaintiff herein; and defendant states that no amendment of said pretended special tax bill No. 17,961, has ever been made in any manner required or approved by law or by the proper officers of the City of St. Louis.

And, further answering, defendant states that no notice of the issuance of any special tax bill against the property referred to in the amended petition of plaintiff herein was ever given to this defendant or to the defendant Emily Gast, and that no notice of the issuance of any pretended amended tax bill or of any property described in plaintiff's amended petition was ever given to this defendant.

Wherefore, having fully answered, this defendant prays to be hence discharged with its costs.

JOHNSON, HOUTS, MARLATT &
HAWES,

*Attorneys for Defendant
Gast Realty and Investment Company.*

On the same 28th day of May, 1910, one of the days of the April Term, 1910, the defendant Emily Gast filed her amended answer, which was in words and figures essentially the same with the exception that the paragraphs marked in the margin heretofore are omitted in this answer.

On the same 28th day of May, 1910, one of the days of the April Term, 1910, the defendant filed its exhibits, marked respectively "Defendant's Exhibits A and B," copies of which said Exhibits "A" and "B" are omitted from this abstract by agreement of the parties, for the reason set forth in the stipulation of the parties, which said stipulation is made a part of this abstract by agreement of the parties and a copy of which said stipulation is in words and figures as follows (omitting caption):

Stipulation as to Exhibits A and B.

It is hereby stipulated and agreed between the parties hereto that the clerk of the Circuit Court shall not insert in his transcript to the Supreme Court of Missouri, any copy of the plat offered in evidence and marked Defendant's Exhibit "A", or the plat marked Defendant's Exhibit "B", or the plat marked Plaintiff's Exhibit "D", because of their great size, and because of the impossibility of reproducing them on a smaller scale, and that the originals of said plats may themselves be presented to the Judges of the Supreme Court at the hearing of this cause on appeal, and it is agreed that the appellant may refer to the originals in his abstract where they are called for, and use them on appeal as if they were fully reproduced therein.

(Signed)

HICKMAN P. RODGERS,
Attorney for Plaintiff.
JOHNSON, HOUTS, MAR-
LATT & HAWES,
Attorneys for Defendant.

49 On the 8th day of June, 1910, during the June Term, 1910, of said court, plaintiff filed its reply, a copy of which is as follows (omitting caption):

Plaintiff's Reply.

Now comes plaintiff and for reply to the new matter contained in defendant's amended answer heretofore filed herein, denies each and every allegation in said answer contained.

(Signed)

HICKMAN P. RODGERS,
Attorney for Plaintiff.

Thereafter, on the 1st day of July, 1910, during the June Term, 1910, of said court, a stipulation was filed, which was in words and figures as follows (caption omitted):

Agreed Stipulation of Facts.

It is stipulated between the plaintiff and the defendant in the above-entitled cause that the following facts are admitted to be true by both parties:

1. That the Board of Public Improvements recommended ordinance No. 23137 to the Municipal Assembly of the City of St. Louis in compliance with the provisions of the Charter of the City; that at the time the said Board of Public Improvements recommended said ordinance the President of the Board of Public Improvements endorsed on said ordinance an estimate of cost, in words and figures as follows:

"House Bill No. 71, Session 1907-8.

Office of the Board of Public Improvements.

St. Louis, — —, 190—.

The Board of Public Improvements estimates the cost of the entire work contemplated by the within ordinance to be done at the expense of the city for proportion of cost against city property — seventeen thousand one hundred and sixty-eight dollars and at the expense of property owners inclusive of city's proportion at forty thousand nine hundred and ninety-two dollars.

A. J. O'REILLY,
President B. of P. I.

Attest:

W. B. DRYDEN, *Secretary.*"

2. That the contractor, Schneider Granite Company, was notified by the Street Commissioner of the City of St. Louis on August 6, 1908, to begin work under contract 8105.

3. That on January 12, 1909, the Street Commissioner certified that the work done by said contractor, Schneider Granite Company, under contract No. 8105, was complete, and certified to the quantities and measurements of said work.

(Signed)

HICKMAN P. RODGERS,
Attorney for Plaintiff.
JOHNSON, HOUTS, MARLATT &
HAWES,
Attorneys for Defendant.

Thereafter, on the 23rd day of November, 1910, one of the days of the October Term, 1910, of said court, this cause came on for hearing before Hon. Daniel D. Fisher, Judge of said court, and the cause being submitted to the Court on the pleadings and the evidence adduced, and the Court being fully advised in the premises, rendered a special judgment for the plaintiff in the sum of \$16,713.74, and the following proceedings were had, as appears by record entries and the following entries showing said judgment was duly entered of record on the same date, which said judgment is in words and figures as follows:

Now at this day, this cause coming on for hearing, plaintiff appearing by Hickman P. Rodgers, its counsel, and defendants appearing by Messrs. Johnson, Houts, Marlatt & Hawes, their counsel, the cause is taken as submitted on the pleadings and proof adduced, and the Court being fully advised in the premises, doth find the issues herein joined in favor of plaintiff; wherefore it is considered and adjudged by the Court that the plaintiff recover herein the sum of sixteen thousand seven hundred and thirteen and 74/100 dollars (\$16,713.74), being the amount of the special tax bill mentioned in the amended petition and accrued interest thereon from March 3rd, 1909, to this day at the rate of eight per cent per annum), and that the same, together with interest thereon, from the date hereof, at the

rate of 6 per cent per annum and the costs of this suit, be charged as a lien against and levied on the real estate mentioned in said amended petition, lying, being and situate in the City of St. Louis, State of Missouri, and described as follows, to-wit: A tract of land in U. S. Survey 1927 and 728, Vol. 1, 48, formerly page 64, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran avenue and running thence westwardly parallel with and 132.50 feet north of the north line of McLaran avenue 115 feet to the public alley in C. B. 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet, thence southwardly along the west line of said property 125 feet to the north line of alley in C. B. 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property 435 feet, thence westwardly along the north line of said — 101.53 feet to the midway line between Broadway and Church Road, thence northwardly along said midway line 205.02 feet to the south line of Bellevue Addition, 70.78 feet to the east line of said addition, thence northwardly along the east line of said addition 445.69 feet to the south line of Hornsby avenue, thence eastwardly along the south line of Hornsby avenue 418.92 feet to the west line of Broadway, thence southwardly along the west line of Broadway 1083.88 feet to the place of beginning; and that execution issue therefor. Draft filed.

Motion for a New Trial Filed.

Thereafter on the 26th day of November, 1910, and during the same October Term, 1910, and within four days after said judgment and decree was rendered, the defendants filed their motion for a new trial, which filing duly appears upon the records of said Court of said date.

Thereafter said motion was duly continued to the December Term, 1910, of said court.

Thereafter, on the 16th day of December, 1910, during the December Term, 1910, of said court, the plaintiff voluntarily entered a remittitur in the sum of \$193.62, as appears from a record entry of said court of said date.

And upon the same 16th day of December, 1910, during the same December Term, 1910, of said court, the Court entered a judgment of record for the plaintiff in the sum of \$16,520.12, a copy of which record entry and judgment (omitting caption) is as follows:

Now at this day comes the plaintiff, by attorney, and voluntarily remits the sum of one hundred ninety-three and 62/100 dollars of the judgment for sixteen thousand seven hundred thirteen and

74/100 dollars entered herein on the 23d day of November, 1910, leaving said judgment stand for the residue thereof, to-wit, the sum of sixteen thousand five hundred twenty and 12/100 dollars. Wherefore it is considered and adjudged by the Court that the plaintiff is entitled to recover the sum of sixteen thousand five hundred twenty and 12/100 dollars, and also its costs herein expended, to be levied out of the property described in the special tax bill and petition herein, and being situated in the City of St. Louis, Missouri, as follows, to-wit: A tract of land in U. S. Survey 1927 and 728, Vol. 1, 48, formerly page 64, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran avenue and running thence westwardly parallel with and 132.50 feet north of the north line of McLaran avenue, 115 feet to the public alley in C. B. 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet, thence southwardly along the west line of said property 125 feet to the north line of alley in C. B. 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property 435 feet, thence westwardly along the north line of said property 101.53 feet to the midway line between Broadway and Church Road, thence northwardly along said midway line 205.02 feet to the south line of Bellevue Addition, thence eastwardly along said south line of Bellevue Addition 70.78 feet to the east line of said addition, thence northwardly along the east line of said addition 445.69 feet to the south line of Hornsby avenue, thence eastwardly along the south line of Hornsby avenue 418.92 feet to the west line of Broadway, thence southwardly along the west line of Broadway 1083.88 feet to the place of beginning; and that execution issue therefor; and that this judgment shall be and constitute a special judgment against the hereinabove described tract of ground, and that said land be sold to satisfy the same, according to law, and that execution issue in conformity with this judgment.

Motion for New Trial Overruled.

Thereafter, upon the 16th day of December, 1910, one of the days of the December Term, 1910, of said court, defendant's said motion for new trial was overruled by said Court, a record entry of which was duly made at the time, to which action of the Court overruling said motion the defendant then and there duly excepted.

Thereafter, on the 3d day of February, 1911, during the same December Term, 1910, of said court, the defendant deposited with the clerk of the Circuit Court a docket fee to the Supreme Court of Missouri of ten dollars. Whereupon, upon the same 3d day of February, 1911, and during the same December Term, 1910, of said

court, the defendant was granted sixty days from said date in which to file its bill of exceptions, as appears by a record entry of said court of said date.

55 Whereupon on the same 3d day of February, 1911, and during same December Term, 1910, of said court, the defendants were granted 10 days after the December Term, 1910, of said court in which to file a bond fixed by an order of said court duly made in the sum of \$16,000, all of which appears by an entry of record of said court of that date.

Affidavit for Appeal and Appeal Granted.

Whereupon on the same 3rd day of February, 1911, and during the same December Term, 1910, of said court, the defendants filed their affidavit for appeal, and their appeal bond, which was approved by an order of court and the defendants were granted an appeal to the Supreme Court of the State of Missouri, all of which appears upon the record of said court of said date.

Thereafter, upon the 10th day of February, 1911, and during the February Term, 1911, of said Court, and within the time theretofore granted, the defendants filed their appeal bond in the sum of \$16,000, with the American Fidelity Company of Montpelier, Vermont, as surety, and said bond was by an order of Court duly made and entered of record of said date, approved and ordered filed.

Thereafter, on the 31st day of March, 1911, during the same February Term, 1911, of said court, the defendants were by an order of said court, duly made and entered at the time of record, granted 30 days additional in which to file their bill of exceptions.

Bill of Exceptions Signed and Filed.

Thereafter, upon the 5th day of April, 1911, during the February Term, 1911, of said court the defendants duly presented their bill of exceptions in this case in open court and within sixty days
56 theretofore granted, and the bill of exceptions being found correct, was, by the Hon. Daniel D. Fisher, Judge of Division No. 1 of said court, approved, signed and sealed and was, by order of Court, allowed and ordered filed and made a part of the record in this cause, which appears by record entry of said court in said cause. The date of the filing is shown by the file mark on said bill and the signature of the clerk endorsed on said bill.

The bill of exceptions containing all the testimony in said cause is set out in full as follows (omitting caption):

Bill of Exceptions.

Appearances:

For the plaintiff, Hickman P. Rodgers.

For the defendants, Messrs. Johnson, Houts, Marlatt & Hawes.

Be it remembered, That on the trial of this case, on the 7th day of June, 1910, at the June Term of said court, the following proceedings were had:

The plaintiff, to maintain the issues on its part, offered evidence as follows:

J. F. CHARTRAND, having been called for the plaintiff and duly sworn, testified as follows:

Direct examination by Mr. Rodgers:

Q. What is your name?

A. J. F. Chartrand.

Q. What is your address?

A. Room 214, City Hall.

Q. You are an assistant to the Comptroller, are you not?

A. Yes, sir; I am special tax clerk in the City Comptroller's office.

57 Q. How long have you been in that capacity?

A. A little over nine years.

Q. I suppose you are acquainted with the signature of Mr. A. J. O'Reilly, who was formerly President of the Board of Public Improvements?

A. Yes, sir.

Q. And of Mr. James Y. Player, who was Comptroller?

A. Yes, sir.

Q. When did they go in and when did they go out of office?

A. James Y. Player went into office in April, 1901, and he went out of office in April, 1909.

Q. When did Mr. O'Reilly go into office?

A. Four years later.

Q. And he went out of office about, or at the same time, Mr. Player did?

A. About the same time.

The Court:

(Q.) Mr. Player went in in 1901?

A. Player was elected for two terms.

By Mr. Rodgers:

(Q.) Then Mr. Reber went in as President of the Board of Public Improvements as successor to O'Reilly?

A. Yes, sir.

Q. And Mr. B. J. Taussig went in as successor to Mr. Player as Comptroller?

A. Yes, sir.

Q. I show you "Exhibit A" in the case, special tax bill 17961, dated February 8th, 1909, in the sum of \$14,522.65, and ask you to look at it and say whether or not the signatures appearing there of O'Reilly, Player and Reber and Taussig, wherever they appear on the bill and the amendment to it, are the genuine signatures of those gentlemen. (Paper shown to witness.)

A. Yes, sir; they are.

Q. And they are their official signatures?

A. Yes, sir; their official signatures.

Q. And the signatures appearing on the amendment dated December 17th, 1909, those are genuine also?

A. Yes, sir.

58 Q. Get your book there and look at page 64. (Witness looks at book.) Now, what have you got at page 64?

A. This is the special tax record.

Q. That is where you register special tax bills in the Comptroller's office?

A. Yes, sir.

Q. With reference to this bill, state briefly what you find registered there?

A. Well, I find the original bill registered here; also the amendment to the original bill.

Q. You find the amendment registered?

A. Yes, sir.

Q. That is an amendment of what date?

A. Amendment of December 17th, 1909.

Q. You find there a copy of the amendment as it appears attached; that is, the amendment, or a carbon copy of the amendment, that is attached to the tax bill; is that right?

A. Yes, sir.

Q. What do you find there that refers to the notice of suit filed in the Circuit Court?

A. It says here, "Suit filed in Circuit Court on bill No. 17,961, February 21st, 1910."

Q. Where did you get that information?

A. From a notice of suit filed in our department.

Mr. Johnson: We think that that is secondary evidence.

Mr. Rodgers: I can testify to giving the comptroller the notice.

Q. That notice you find entered here, is that it?

A. Yes, sir.

(No cross-examination.)

Mr. Rodgers: I will offer in evidence the special tax bill that has been identified by the witness. I offer the bill and the amendment to the bill. It is "Exhibit A" in this suit in the petition. It is No. 17,961.

The Court: That is the original bill?

Mr. Rodgers: Yes, sir.

The Court: The number is not changed?

Mr. Rodgers: No, sir; the amendment is dated December 17th, 1909. This is the same bill that is described in the plaintiff's petition.

Mr. Marlatt: We object to the introduction of this bill for the reason that the description of the property therein contained is indefinite and insufficient, and does not describe any property that could be located or identified from the bill, and for the reason that the attempted amendment which is attached is void, there being no provision of law for such an amendment or any amendment; and for the reason that the pretended amendment is not signed by the proper officers of the City of St. Louis; and for the reason that James Y. Player, Comptroller, and A. J. O'Reilly, President of the Board of Public Improvements, were out of office when they attempted to sign this amendment; and for the reason that Maxime Reber, President of the Board of Public Improvements, and B. J. Taussig, Comptroller, were not in office and were not officers of the City of St. Louis at the time the tax bill was issued; and for the further reason that there is no evidence of a notice having been given to the owners of the property of either the original bill or the attempted amendment to the bill, or of the pretended amended bill, and there is no allegation in the petition of any notice given of an amended bill or of a pretended amended bill. And on behalf of Emily Gast particularly we object, that there is no allegation in the bill of notice to her of the issuance of the bill or amendment to the bill before the suit was brought.

The Court: The bill will be taken subject to the objection.
60 To which ruling of the Court counsel for defendant then and there duly excepted.

Mr. Marlatt: We object to it further. The bill as introduced shows that a bill was filed as an exhibit to suit No. 64,551, series A, room 8, to the February Term, 1910, and the record which the plaintiff has offered in evidence shows that no notice was filed in the office of the President of the Board of Public Improvements within ten days after the filing of that suit, and therefore no further or other suit could be filed on the bill.

The Court: The bill is admitted in evidence subject to the objection.

Said bill, marked "Plaintiff's Exhibit A," a copy of which is inserted in this book opposite page —.

EDWARD BERGT, having been called for the plaintiff and duly sworn, testified as follows:

Direct examination by Mr. Rodgers:

Q. What is your name?

A. Edward Bergt.

Q. What is your occupation?

A. Deputy Collector of the Revenue.

Q. You were at one time, I believe, a deputy of the Marshal of the City of St. Louis?

A. Yes, sir.

Q. Were you in that office, deputy marshal, on the 3d day of March, 1909?

A. Yes, sir.

Q. I show you a return on the back of the special tax bill notice to the Gast Realty and Investment Company, notice of special tax bill No. 17,961, in the sum of \$14,522.65, and I will ask you who signed that return that is on the back of that notice? (Paper shown to witness.)

A. I did; that is my signature.

Q. You did that as deputy marshal?

A. Yes, sir; that is my return.

61 Mr. Johnson:

(Q.) Is that the only date on which you served any notice of special tax bills?

Objected to.

The Court: What is the date of that?

Mr. Rodgers: Service is the 3d day of March, 1909. I object to the question because the charter says that the return of the marshal shall be conclusive, so the only question before the Court with regard to this return is whether this is the marshal's return. We will admit that this is the only notice, and I will offer in evidence the notice and marshal's return, marked "Plaintiff's Exhibit B."

Mr. Marlatt: We object to the introduction of this special tax bill notice and the marshal's return on behalf of the Gast Realty & Investment Company, for the reason that the description of the property on the face of the notice is insufficient, indefinite and not sufficient to locate or describe any property or give the owner of any property notice; that it is different from the description of the property sued upon and described in the petition in this cause; and for the reason that it gives notice only of an original bill and no notice of any pretended amended bill or any pretended amendment to a bill; and for the reason, on behalf of defendant Emily Gast, that her name is not on here and the return does not show any service of any kind. I object for those reasons, as well as for the reasons we urged on behalf of the other defendant; and it shows on its face that it gives notice of an entirely different tax bill from the one sued upon in this case.

Mr. Rodgers: There is nothing to show that Emily Gast had any interest in the property at the time when the original tax bill was issued; she first appears in the transaction December 17th,

62 1909

The Court: You say she acquired her interest subsequent to the issuance of the original bill and before the amendment of the bill?

Mr. Rodgers: I say she acquired her interest after this notice was served, on the 4th day of March, 1909.

The Court: Those may go in.

To which ruling of the Court counsel for defendant then and there duly excepted.

Said notice and return are in words and figures as follows:

PLAINTIFF'S EXHIBIT B.

Special Tax Bill Notice.

Gast Realty & Investment Co.—Owner.

You are hereby notified that special tax bill No. 17,961 for \$14,522.65, date Feb. 8, 1909, has been issued to Schneider Granite Co., Contractors, under ordinance No. 23137, contract No. 8105, for work done on Broadway between a line about 285 feet south of Pelham avenue and Hornsby avenue, and chargeable against property described in said special tax bill as follows:

Lot No. —, in city block No. Vol. 1, pa. 64, said ground having	1085.71	327.18
an aggregate front of _____ feet, by a depth of _____ feet,	1083.88	418.92

bounded north by Hornsby avenue, east by Broadway, south by alley et al., and west by Luedinghaus, Jr., et al.

This bill is payable as provided by section 25, Article VI, of the City Charter, and the Lafayette Bank, Broadway and Merchant St., has been designated as the place of payment thereof, where payment of the bill in full may be made without interest within
63 thirty days after service of this notice; otherwise, in accordance with said section and article.

Payment thereof is now demanded.

SCHNEIDER GRANITE CO., *Contractors.*

By B.

Lafayette Bank, Broadway and Merchant St.

STATE OF MISSOURI,

City of St. Louis, ss:

Executed the within notice, in the City of St. Louis, on the 3rd day of March, 1909, by delivering a true copy of the same to A. T. Gast, president of the within named Gast Realty & Inv. Co. (a corporation).

GEO. P. WEINBRENNER,

Marshal of the City of St. Louis,

By EDW. BERGT, *Deputy.*

Mr. Marlatt: I call your Honor's attention to the fact that the amended bill is the one sued on in this instance and the amended bill purports to be against her, and yet no notice of that amended bill was ever given.

Mr. Rodgers: Now, I believe it is admitted that a portion of the ground was conveyed to Emily Gast on the 4th day of March 1909?

Mr. Marlatt: No, the answer alleges that the conveyance from the Gast Realty & Investment Company to Emily Gast of her portion of the property was made on the 24th day of November, 1908.

Mr. Rodgers: Recorded March, 1909. Are you willing to admit it bears record the 4th day of March, 1909?

The Court: What was the date she acquired it?

Mr. Marlatt: We will look it up to see what the real date is.

The Court: When was the deed executed?

64 Mr. Marlatt: Executed the 24th day of November, 1908.

Mr. Rodgers: We will agree on the date, or I will bring in some certificate from the Recorder, if necessary. I know it is the 4th day of March, 1909.

Mr. Marlatt: Well, all right; we will admit that if he says he knows it. Your Honor takes these subject to the objection.

The Court: Yes, sir.

HICKMAN P. RODGERS, having been called for the plaintiff and duly sworn, testified as follows:

Witness: My name is Hickman P. Rodgers; I am attorney for the plaintiff in this case. On the 23d day of February, 1910—

Mr. Marlatt: We object to the competency of this testimony.

Witness: I will make the offer and then you may make your objection. I handed to Mr. Chartrand, the assistant to the Comptroller of the City of St. Louis, a notice, and I have here a carbon copy of that notice which was handed to him. This indicates certain changes that were made in ink, and the same changes were made on that notice that was handed him and filed in his office, and he, in my presence, entered on the Comptroller's books, or book 40, page 64, the entries that he has exhibited to the Court here today and about which he has testified. I will ask to have this notice marked as "Plaintiff's Exhibit C."

Mr. Marlatt: I object to the evidence offered by Mr. Rodgers, on the ground that according to the testimony heretofore offered by him this bill was filed previously in suit 64,551, room 8,
65 to the February Term, 1910, and the records offered in evidence from the Comptroller's office show no such notice was given at the filing of that suit, therefore no other suit could be filed.

Mr. Rodgers: I offer that notice in evidence.

The Court: It may go in.

To which ruling of the Court counsel for defendants then and there duly excepted.

Said notice, marked "Plaintiff's Exhibit C," is in words and figures as follows:

PLAINTIFF'S EXHIBIT C.

To the Comptroller of the City of St. Louis:

Take Notice, That on the 21st day of February, 1910, suit was filed in the Circuit Court, City of St. Louis, Missouri, to enforce special tax bill numbered 17,961 in the sum of \$14,522.65, issued to the Schneider Granite Company on February 8th, 1909, for work of improvement of Broadway between a line about 285 feet south of Pelham avenue and Hornsby avenue under contract numbered 8,105, charged against a tract of land in U. S. Surveys 1927

and 728, Vol. 1, 48, formerly page 64, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran avenue and running thence westwardly parallel with and 132.50 feet north of the north line of McLaran avenue 115 feet to the public alley in C. B. 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet, thence southwardly along the west line of said property 125 feet to the north line of alley in C. B. 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property 435 feet, thence westwardly along the north line of said property 101.53 feet to the midway line between Broadway and Church road, thence northwardly along said midway line 205.02 feet to the south line of Bellevue addition, thence eastwardly along said south line of Bellevue addition 70.78 feet to the east line of said addition, thence northwardly along the east line of said addition 445.69 feet to the south line of Hornsby avenue, thence eastwardly along the south line of Hornsby avenue 418.92 feet to the west line of Broadway, thence southwardly along the west line of Broadway 1,083.88 feet to the place of beginning, and originally made out in the name of Gast Realty & Investment Company as owner thereof.

That the above-mentioned special tax bill is registered in volume 40, page 64 of your office; and that said suit is entitled *Schneider Granite Company, plaintiff, v. Gast Realty & Investment Company and Emily Gast, defendants.*

HICKMAN P. RODGERS,

Attorney for Schneider Granite Co., said Plaintiff.

Mr. Rodgers: I believe it is admitted that the bill that has been offered in evidence is still the property of the plaintiff in this case, and it remains unpaid—nothing has ever been paid on account of it.

Mr. Marlatt: Nothing has been paid.

Mr. Rodgers: Now, with the understanding that the tax bill is in evidence, the Marshal's return, the notice, and the copy of the notice given to the Comptroller, the plaintiff will rest his case.

The defendant here asked the Court to make the following finding:

67 The Court instructs that under the pleadings and the evidence in this case the finding will be for the defendants and the plaintiff cannot recover.

The Court refused to find as requested; to which refusal of the Court counsel for defendants then and there duly excepted.

Mr. Johnson: We will offer in evidence a plat marked "Exhibit B" attached to the answer, which, I understand, it is admitted was prepared by the Street Commissioner at the time of the public hearing before the Board of Public Improvements preliminary to

the recommendation of the ordinance and showing the proposed benefited district.

Mr. Rodgers: I will admit such a plat was submitted by the Street Commissioner, but I say that it is not evidence in this case, because the Street Commissioner has no power to lay off the benefited district in advance of the improvement.

The Court: Do you admit that that is a correct plat?

Mr. Rodgers: I admit it is a correct plat.

The Court: You admit it is a correct plat of the property up there, and of its boundaries—that it describes the property and the boundaries?

Mr. Rodgers: Yes, sir.

Mr. Johnson: Do you admit that this plat was present at the public hearing of the Board of Public Improvements prior to the recommendation of the Board of Public Improvements of the ordinance?

Mr. Rodgers: I don't know that. I will admit the Street Commissioner prepared it, and that he submitted it to the Board of Public Improvements preliminary to the passage of the ordinance for the improvement in this case, but I say it is immaterial if the Street Commissioner did that, because he has no power to fix it;
68 it would be only a sketch or proposal or estimate.

The Court: It may go in.

(Said original plat, marked "Defendants' Exhibit B" has, by stipulation hereinbefore set out, been filed in this court.)

The Court: The plat that has been offered is a duplicate of the one before the Court?

Mr. Marlatt: It is a little bit different, but it is practically the same.

The Court: It gives the same boundaries?

Mr. Marlatt: This (indicating) was made by the plaintiff and that (indicating) was made by the city officials.

Mr. Marlatt: "Defendants' Exhibit A" is offered in evidence. This is a blueprint showing—

The Court: That is "Plaintiff's Exhibit A"?

Mr. Marlatt: "Defendants' Exhibit A" from a tracing of the benefit district in the office of the Board of Public Improvements.

Mr. Johnson: You admit that Exhibit "A" is a plat in the office of the Board of Public Improvements?

Mr. Rodgers: I will admit that that is a copy of the plat in the office of the Assessor of Special Taxes, being a department of the Board of Public Improvements.

Mr. Johnson: And shows the benefit district as finally determined by the assessor?

Mr. Rodgers: Yes, sir.

Mr. Rodgers: There is some confusion about these plats, or about the identity of them. They describe in their answer a certain plat, and they call that "Exhibit A." Now, they put that plat in evidence here and call it "Exhibit B."

Mr. Marlatt: No, sir.

69 The Court: They call the first plat "Exhibit B" and the next one "Exhibit A."

Mr. Rodgers: "Exhibit A" is the one that comes from the special tax department?

Mr. Marlatt: Yes, sir.

Mr. Rodgers: All the figures on these plats may be considered as a part of the evidence just as though those figures and the descriptions were testified to by a witness.

The Court: The lines and the figures go in.

Mr. Rodgers: They all go in.

The Court: I suppose they are admitted to be accurate as they are drawn, giving the lines, distances, and so on.

Mr. Rodgers: Mr. Marlatt thinks that there should be some evidence that those distances are correct. I am willing to dispense with any proof on the subject of distances because these plats correctly state those distances. It is also admitted that the plat contains figures showing the amount chargeable according to the computation made by the Assessor of special taxes against the district and areas described.

(Said plat, marked "A," is offered in evidence by counsel for defendants, and the original is, by stipulation herein set out, filed in this court.)

Mr. Johnson: We offer in evidence city ordinance No. 23,137, an ordinance to improve Broadway between a line about two hundred and eighty-five feet south of Pelham avenue and Hornsby avenue. It is admitted that this is a correct copy of the ordinance.

Mr. Rodgers: Yes, sir; that is admitted.

Mr. Marlatt: Both sides admit that this is the ordinance which was passed.

70 Said ordinance No. 23,137, marked "Defendants' Exhibit C," is in words and figures as follows:

DEFENDANTS' EXHIBIT C.

(23,137.)

An ordinance to improve Broadway between a line about two hundred and eighty-five feet south of Pelham avenue and Hornsby avenue.

Be it ordained by the Municipal Assembly of the City of St. Louis as follows:

Section One. The Board of Public Improvements is hereby authorized and directed to cause Broadway between a line about two hundred and eighty-five feet south of Pelham avenue and Hornsby avenue, except so much thereof as the railway company having tracks on said streets is by law obligated to improve, to be improved by grading, preparing the roadbed or ground for the superstructure, setting new curbing, laying a roadway pavement of granite blocks

on a concrete, making all proper connections and intersections with other streets and alleys, and to provide that the contractor doing the work shall guarantee and keep in repair all of the aforesaid work and the materials used in connection therewith for a term of nine years, commencing one year from the date of completion and acceptance of the work of improvement, all in accordance with plans and specifications on file in the offices of the Board of Public Improvements and the Street Commissioner.

Section Two. The base shall be a bed of Portland cement concrete, and the paving shall be granite blocks laid on a bed of sand. The curbing shall be granite and rest on a base of concrete and be backed with concrete.

Section Three. The grading shall be done in accordance with the directions of the Street Commissioner. The roadbed or

71 ground for the superstructure shall be prepared to a depth of thirteen inches below the intended surface of the roadway. On the roadbed a base of Portland cement concrete six inches deep shall be laid; upon this base there shall be laid a bed of sand about two inches deep before being compacted. Upon this bed of sand a pavement of granite blocks shall be laid. The blocks shall not be less than nine inches nor more than twelve inches long, not less than three and one-half inches nor more than four and one-half inches wide, not less than five inches nor more than six inches deep, and dressed true to the square closely approximating a rectangle in every section with opposite sides nearly equal. The joints shall be swept full of sand and the pavement thoroughly rammed. The surface shall then be sanded and a hose applied to wash in the sand until the water flushes to the surface. The pavement shall then be thoroughly rolled. The curbing shall have a straight face, rough pean hammer finish to an even surface on the side toward the roadway for the full depth of the stone, and pitched to line and rough pointed on the side toward the sidewalk to a depth of six inches from the top of the curb, and shall have close end joints to the full depth of the stone, and no stone shall be less than four and one-half feet long, nor less than six inches thick, nor less than sixteen inches deep. The curbing shall rest on concrete six inches deep and twelve inches wide, and backed with concrete six inches wide and ten inches deep, or six inches below top of curbing.

Section Four. The total cost of the foregoing work and all proper connections and intersections required, except so much thereof as the railway company having tracks on said street is by law obligated to pay, and except further, so much thereof as is provided to be paid

72 by the City of St. Louis by Section Five of this ordinance, shall be ascertained and be levied and assessed as a special tax upon all the property within a district defined and bounded by Section Fourteen of Article Six of the Charter of the City of St. Louis.

When said work is completed without regard to the provision of guarantee, the same shall be paid for by the issuance of special tax bills in accordance with the Charter of the City of St. Louis. Each of said special tax bills so to be issued shall be divided into

seven equal parts, the first installment to become due and payable thirty days after due notice of the issuance thereof without interest and the remaining installments become due and payable at intervals of one year thereafter with interest as provided by law.

Section Five. Whereas, in the district aforesaid there is located St. Louis Waterworks, property of the City of St. Louis, which is not liable to special assessment, and whereas the proportion of cost of the aforesaid improvement which would have been assessed against said property of the city, were it not exempt from assessment, amounts to seventeen thousand one hundred and sixty-eight dollars, there is hereby appropriated and set apart out of real estate account for city's proportion of cost against property of the city for reconstructing and improving streets, alleys or sidewalks, said sum of seventeen thousand one hundred and sixty-eight dollars to pay for the city's proportion of said cost.

Approved July 24, 1907.

Mr. Johnson: We now offer in evidence the contract made between the plaintiff in this case and the City of St. Louis, dated the 23rd day of October, 1907, approved by the City Counselor October 29th, 1907, and approved by H. A. Foreman, President of
73 the Council and Acting Mayor, October 30th, 1907. This was made under the provisions of ordinance 23,137.

Said contract, marked "Defendants' Exhibit D," was here read in evidence by counsel for defendants in words and figures as follows:

DEFENDANTS' EXHIBIT D.

Class "GG"—Contract and Specifications for Granite Street Construction—Granite Curb.

Agreement, Made and Entered into this 23rd day of October, A. D. 1907, by and between Schneider Granite Company, a corporation, party of the first part, and the City of St. Louis, party of the second part, witnesseth:

Whereas, the Board of Public Improvements of the said City of St. Louis, under the provisions of Ordinance No. 23,137, approved July 24, 1907, and by virtue of the authority vested in the said board by the Charter and general ordinances of the city, did let out unto the said Schneider Granite Company the work of improving Broadway between a line about 285 feet south of Pelham avenue and Hornsby avenue, by grading, preparing the roadbed or ground for the superstructure, furnishing and setting granite curbing on concrete foundation and backed with concrete, laying a roadway pavement of granite blocks on a concrete base, making all proper connections and intersections with other streets and alleys; and to guarantee and keep in repair all of the aforesaid work and the materials used in connection therewith for a term of nine years, commencing one year from the date of completion and acceptance of the work of improvement, as by the above-mentioned ordinance specified.

Now, therefore, in consideration of the payments and covenants hereinafter mentioned to be made and performed by said
 74 second party, the said Schneider Granite Company hereby covenants and agrees to do the work above mentioned in a substantial and workmanlike manner, in conformity with the plans of such work on file in the offices of the Board of Public Improvements and the Street Commissioners of the City of St. Louis, and in strict obedience to the directions which may from time to time be given by the said Street Commissioner, or his duly authorized agents, and in accordance with the following

Specifications.

[The specifications contain the usual provisions for material and methods of doing the work and the contract contains the usual provisions relating to the commencement and prosecution of the work and contains certain general stipulations providing for a compliance with all charter provisions and then contains the following:]

8. This contract is entered into subject to the approval or rejection of the council, and subject to the City Charter, and ordinances in general, and in particular to the following provisions of Article VI, Section 28, of said Charter, and of Sections 1921 to 1932, all inclusive, of "The Revised Code of St. Louis," all of which by this reference are made parts hereof as if here fully set forth:

(a) The aggregate payments under this contract shall be limited by the appropriation contained in ordinance No. 23,137, authorizing the work to be done.

The manner of payment is provided in the contract, as follows:

75 "When all the work embraced in this contract is fully completed, agreeable to the specifications and stipulations of this agreement, without regard to the provision of guarantee, and accepted by the Street Commissioner, said Commissioner shall cause a careful measurement of said work to be made, and certify the same to the President of the Board of Public Improvements, who shall compute the cost thereof according to the terms and prices of this agreement and levy and assess the same as a special tax against each lot of ground chargeable therewith in the names of the owners thereof.

The lots of ground chargeable as aforesaid are those embraced within a district defined and bounded in Section 14, of Article 6 of the Charter of the City of St. Louis.

One-fourth of said cost shall be levied and assessed as a special tax upon all property fronting upon or adjoining the improvement hereinbefore described in the proportion that the frontage of each lot, so fronting or adjoining, bears to the total aggregate of frontage of all lots or parcels of ground upon or adjoining the improvement, and the remaining three-fourths of the cost shall be levied and assessed as a special tax upon all the property in area district defined and bounded in said Section 14 of Article 6 of the Charter of the City of St. Louis, in the proportion that the area of each lot or parcel

of ground, or the part of such parcel of ground lying within said district, bears to the total area of this district, exclusive of streets and alleys, except that no assessments shall be made or levied upon property owned by the City of St. Louis, but the said city will pay such portion of said cost as would have been assessed against its property were it not exempt from assessment, as provided by ordinance No. 23,137.

Each of said special tax bills so to be issued shall be divided into seven equal parts, as provided by the ordinance authorizing
76 said improvement, the first installment to become due and payable thirty days after due notice of the issuance thereof, without interest, and the remaining installments to become due and payable at intervals of one year thereafter; provided, however, that the owner or any person interested in the property charged with any tax bill may pay the same in full at any time within thirty days after such notice, without interest, and may pay the same in full at any time by paying interest thereon as follows:

If paid at or before maturity, and more than thirty days after notice, as aforesaid, at the rate of six per cent per annum from date of notice to date of payment; if paid after maturity, at the rate of six per cent per annum from date of notice to date of maturity, and at the rate of eight per cent per annum from date of maturity to date of payment. All interest to be payable annually from date of notice as aforesaid, and if any installment or equal part, or any interest on any installment, be not paid when due, then, at the option of the holder thereof, all remaining installments shall become due and collectible with interest thereon as above provided. And said special tax bills shall be made out by the President of the Board of Public Improvements, and by him registered in his office in full, and certified and delivered to the Comptroller and his receipt taken therefor, and by him registered and countersigned and delivered to the party of the first part, in whose favor they are issued for collection, and his receipt taken in full of all claims against the city on account of said work."

The contract was duly executed.

Mr. Johnson: I offer in evidence ordinance No. 22,546, an ordinance to vacate Hornsby avenue. It is admitted that "Defendants' Exhibit E" is a correct copy of the ordinance which
77 was approved September 25th, 1906. It is admitted that the dedication of Hornsby avenue was signed by the president of the Gast Realty & Investment Company, December 10th, 1907. That means the new Hornsby avenue, the dedication of what we call New Hornsby avenue, approved by the Board of Public Improvements February 7th, 1908, and recorded March 5th, 1908, plat book 18, page 8.

Said ordinance, marked "Defendants' Exhibit E," was here read in evidence by counsel for defendants in words and figures as follows:

DEFENDANTS' EXHIBIT E.

(22546.)

An Ordinance to Vacate Hornsby Avenue.

Be it ordained by the Municipal Assembly of the City of St. Louis as follows:

Section One. That part of Hornsby avenue running from Broadway westwardly and southwardly in an irregular line to a point one hundred and fifty-five feet one-fourth inch east of the east building line of Church road, is hereby vacated and abolished.

Section Two. The vacation of said portion of Hornsby avenue is expressly conditioned upon the dedication to public use as a public highway, by the party or parties interested in such vacation, of a strip of ground described as follows: A strip of ground sixty feet wide extending from the west line of Broadway to Hornsby avenue, as established in subdivision known as Walter Place, the south line of which strip of ground sixty feet wide to be eleven feet south of and parallel to the prolongation eastwardly of the south line of Hornsby avenue in said Walter Place.

Approved September 25, 1906.

GEORGE H. DECKER, having been called for the defendants and duly sworn, testified as follows:

Direct examination by Mr. Johnson:

Q. What is your name?

A. George H. Decker.

Q. What is your business?

A. I am comparer in the Recorder of Deeds' office.

Mr. Rodgers: It is admitted that this is one of the books in the office of the Recorder of Deeds for the City of St. Louis; it is admitted that what is shown in this book as Bellefontaine Plank road is now Broadway, in the City of St. Louis. I want to object to this plat.

The Court: They have not made the offer yet.

Mr. Johnson: We offer the plat shown on pages 434 and 435 of the general records of the Recorder's office of the City of St. Louis, book 158, showing particularly lots II and I of subdivision of H. Gimblin under the directions of commissioners, said lot fronting on Bellefontaine Plank road, now known as Broadway.

Mr. Rodgers: I object to the record offered because the plat referred to is merely an exhibit to a commissioner's report in a partition suit; it is not a plat in the sense of the Charter of the City of St. Louis, and there is nothing going to show that the City of St. Louis, by any of its officers, ever accepted this as a plat or ever excepted the ground designated here as a subdivision.

The Court: It may go in for what it is worth.

Said plat is hereto attached.

This deed and the plat attached thereto show lots "H"

and "I" as parts of the subdivided tract of land and the same lots "H" and "I" as are indicated and platted in Defendants' Exhibits "A" and "B" and also in Plaintiff's Exhibit "D", and that said lots "H" and "I" are platted and front on Broadway, and that other lots, "A", "C", "D", "E", "F" and "G" extend further to the east of lots "H" and "I", and that still other lots of said subdivision are on the west side of Broadway.

Mr. Rogers: I would suggest that they have a tracing made of that.
The Court: You cannot do it here now.

Mr. Johnson: We will do that.

Mr. Johnson: I offer in evidence the deeds to the City of St. Louis to those two lots, conveying lots H and I, said deeds being recorded in book 1039, pages 215 and 216 of the St. Louis Recorder's office.

Said deeds are in words and figures as follows:

This Indenture, made on the twenty-eighth day of August, A. D. one thousand eight hundred and ninety-one, by and between Thomas T. Stramcke and Rebecca W. Stramcke, his wife, of the County of Lafayette, in the State of Missouri, parties of the first part, and the City of St. Louis, in the State of Missouri, party of the second part, witnesseth, that the said parties of the first part, in consideration of the sum of fifty-seven thousand and ninety dollars to them paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these present- grant, bargain and sell, convey and confirm unto the said party of the second part and its assigns the following-described lots, tracts or parcels of land containing in the aggregate thirty-eight 06/100 acres and 80 lying, being and situated in the City of St. Louis, State of Missouri, to-wit:

All that lot, tract or parcel of land known and designated as lot H, upon the plat of subdivision of a part of U. S. Survey 728, made by the Commissioners in partition of the estate of Henry Gimblin, deceased, a copy of which plat is recorded in the Recorder's office of the City of St. Louis, in book 158, page 434, with the exception of a certain strip of land having a perpendicular width of one hundred and twenty feet between parrallel lines which said last-mentioned strip of land was conveyed by us, the aforesaid parties of the first part, to the City of St. Louis by deed dated June 27th, 1889, recorded in the Recorder's office of the City of St. Louis, in book 921, page 111; also all that lot, tract or parcel of land known and designated as lot I upon the plat of subdivision of a part of U. S. Survey 728, made by the commissioners in partition of the estate of Henry Gimblin, deceased, a copy of which plat is recorded in the Recorder's office of the City of St. Louis, in book 158, page 434, with the following exceptions, to-wit: A strip of ground containing one acre, having a front of eighty feet on the east line of Broadway and running back eastwardly along the south line of said lot I so far as to make the said quantity one acre, being the same strip of land conveyed by Mary E. Boyd, wife of William Boyd, to Charles War-mann by deed dated June 26th, 1865, recorded in the Recorder's office of the City of St. Louis in book 302, page 544; also a strip of land having a perpendicular width of one hundred and twenty

feet between parallel lines which said last-mentioned strip of land was conveyed by us, the aforesaid parties of the first part, to the City of St. Louis by deed dated June 27th, 1889, recorded in the Recorder's office of the City of St. Louis in book 921, page 111, and also all that lot, tract or parcel of land known and designated as lot D upon the plat of subdivision of a part of U. S. Survey 728, made by the commissioners in partition of the estate of Henry Gimblin, deceased, a copy of which plat is recorded in the Recorder's office of the City of St. Louis in book 158, page 434. To have and to hold the premises aforesaid with all and singular the rights, privileges, appurtenances and improvements thereto belonging or in any wise appertaining unto the said party of the second part and its assigns forever, I, the said Thomas T. Stramcke, hereby covenanting to and with the said City of St. Louis and its assigns for himself, his heirs, executors and administrators to warrant and defend the title to the premises hereby conveyed unto the said party of the second part and unto its assigns forever against the lawful claims and demands of all persons whomsoever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

THOMAS T. STRAMCKE. [SEAL.]
REBECCA W. STRAMCKE. [SEAL.]

The said deed had all of the proper certificates attached, including proper certificate of acknowledgment, and was duly recorded in book 1039, at page 215, in the office of the Recorder of Deeds on the 7th day of September, 1891.

Mr. Rogers: I am willing to admit that all those distances and dimensions shown on the plat before your Honor there and all the streets and alleys and highways shown on that plat are all correct; not only that the plat is correct, but that the streets shown there are actual streets of the City of St. Louis, and that the ground shown there is the ground of the City of St. Louis and of the size and dimensions indicated in this plat; that the width of those streets is the same as given in this plat. That is to obviate the necessity for any proof of the conditions on which the plat is based.

Mr. Johnson: It is admitted that the streets shown on the plat are public streets of the City of St. Louis.

ALEXANDER T. GAST, having been called for the defendants and duly sworn, testified as follows:

Direct examination by Mr. Johnson:

Q. What is your full name?

A. Alexander T. Gast.

Q. What office do you hold in the Gast Realty & Investment Company?

A. President.

Q. How long have you been president of that company?

A. Ever since it was organized; I don't remember when that was; in the summer of 1906, I believe.

Q. Does that company own the following described tract of land: A tract of land in United States Survey 1927 and 728, Vol. 1, 48, formerly page 64, beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran avenue, running thence westwardly parallel with and 132.50 feet north of the north line of McLaran avenue 115 feet to the public alley in city block 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet, thence southwardly along the west line of said property 125 feet to the north line of alley in city block 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property of Luedinghaus 435 feet, thence westwardly along the north line of said property of said Luedinghaus 437 feet 1¼ inches to the east line of an alley, thence north along the east line of said alley 233.12 feet to the south line of Bellevue Addition, thence north about 450 feet to the south line of Hornsby avenue, thence east about 928 feet to the west line of Broadway—

Witness: That is a mistake; that should be 828.

Q. —thence east along the south line of Hornsby avenue to the west line of Broadway, thence south about 1084 feet to the place of beginning. Does your company own that piece of property?

A. Yes, sir.

Q. About 1084 feet—

A. Yes, sir.

Q. From the south line of Hornsby avenue to this point (indicating)?

A. Yes, sir.

Q. Has your company owned that property for the last four years?

A. Yes, sir.

Q. With the exception of one small tract of land which stands in the name of Emily Gast?

A. Yes, sir.

Q. Now, did your company, on November 24th, 1908, deed to Emily Gast a tract of land having a front of 50 feet on the west line of Broadway by a depth of 125 feet, the south line of said tract being 215 feet north of and parallel with the north line of McLaran avenue?

Objected to as immaterial; there is nothing to show that the deed was recorded at that time; objection overruled.

A. Yes, sir.

Q. Your company now owns and has owned for the last
84 four or five years all of the balance of the property described as I have just read to you?

A. Yes, sir.

Q. Now, Mr. Gast, what is the character of that property?

A. Acreage property, unplatted.

Q. Is it divided up into lots?

A. No, sir; not divided into lots.

Q. Is it divided into blocks?

A. No, sir.

Q. The entire tract has never been divided at all, has it, Mr. Gast?

A. No, sir.

Q. Has it ever been platted?

A. No, sir.

Mr. Marlatt: Will you figure the distance from here to here (indicating)

Mr. Rodgers: Do you want to show the north line of this property as it runs along the south line of the present Hornsby avenue westwardly from Broadway; is that it?

Mr. Marlatt: Yes, sir.

Mr. Rodgers: All right, give that distance.

Witness: 846.44 feet.

By Mr. Johnson:

(Q.) Now, Mr. Gast, are there any streets running through that property?

A. No, sir.

Q. Is the property immediately west of this tract, is that property platted and divided into lots?

Objected to as immaterial; objection overruled.

A. Yes, sir; that is divided into lots.

Q. And is the property immediately south of this tract platted and divided into lots?

A. Yes, sir.

Q. Is the property at the other side of Broadway on the east of this tract divided into lots?

A. Yes, sir.

Q. Also into blocks?

A. Yes, sir.

Q. City blocks and lots?

A. Yes, sir.

Q. Now, Mr. Gast, what are your plans as to dividing that property up?

85 Objected to what his plans are; objection sustained; to which ruling of the Court counsel for defendants then and there duly excepted.

Mr. Johnson: I offer to show that the company proposes to divide this tract into city blocks and run three streets in a northerly and southerly direction through the property and also streets from east to west through it and divide it up into city blocks and lots and put it on the market as city lots.

Objected to as immaterial; objection sustained; to which ruling of the Court counsel for defendants then and there duly excepted.

Mr. Johnston: I also offer to show that the company has at the present time and had at the time this tax bill was issued authorized plans drawn and was ready to subdivide the property into city blocks and lots.

Objected to; objection sustained; to which ruling of the Court counsel for defendants then and there duly excepted.

Q. Where is Jordan street?

Objected to as immaterial.

The Court: He may answer the question.

A. West of Broadway about 394 feet, according to this map.

By Mr. Johnson:

(Q.) And runs parallel to Broadway, does it?

A. Yes, sir.

Q. Has that been open to this property that we have been talking about? It is open, is it, to the property belonging to the company?

A. Yes, sir; up to the north line of our property.

Q. Now, if Jordan street should be extended would that go through this property we have been discussing?

Mr. Rodgers: I object to that. They have shown that Jordan street is a considerable distance north of the property involved in this suit, and now the question is, if it were extended to a place where it is not would it go through the property involved in this case, and that is conjectural and immaterial.

Objection sustained; to which ruling of the Court counsel for defendants then and there duly excepted.

By Mr. Johnson:

(Q.) Do you know whether Jordan street was open when these improvements were made?

A. I think so, but I am not certain.

Q. Open where?

A. As shown on the plat here.

Q. Now, this Hornsby avenue, the shaded street shown on this plat, has that street been vacated?

A. Yes, sir.

Q. Did it run as shown on the plat before its vacation?

A. Yes, sir.

Q. Are you familiar with the lots H and I, where the Baden pump station is?

A. Yes, sir.

Q. What is there on these lots?

A. Pump station and boiler house, machine shop.

The Court:

(Q.) City water works?

A. Yes, sir.

By Mr. Johnson:

(Q.) How do those lots front?

A. Broadway, according to my judgment.

Objected to.

The Court: The plat shows it, but if they want to show it, all right. It is only wasting time.

Mr. Johnson: I am asking him where they front.

Objected to as a conclusion of the witness, and that is a question to be determined by the Court.

By Mr. Johnson:

(Q.) What kind of a street is Broadway there?

A. It is an important thoroughfare there.

87 Q. The most important thoroughfare in that section of the city?

A. Yes, sir.

Q. How many feet wide is it?

A. Eighty feet.

Q. Residences, stores and buildings along Broadway, where are they placed, which way?

A. Fronting Broadway.

Q. What kind of a street is Gimblin road?

A. Thirty-foot street; thirty feet wide; unimproved.

Q. From what do you enter buildings on lots H and I?

A. The buildings are not directly on the street, but the main door faces Broadway.

The Court:

(Q.) You have reference to the Water Works buildings. Are they near Broadway?

A. Yes, sir; about 50 feet back.

The Court:

(Q.) How far from the other street?

A. Much farther from the other street.

The Court:

(Q.) Which way do they bring in their coal supplies?

A. From the east side—from the river side.

By Mr. Johnson:

(Q.) Way back?

A. Yes, sir.

Mr. Rodgers:

(Q.) You don't mean another street to the east of it?

A. No, sir; from the east simply.

By Mr. Johnson:

(Q.) How many entrances into the building?

A. The main entrance faces Broadway.

Q. The main entrance is on Broadway?

A. Yes, sir.

Mr. Johnson: It is admitted that the notice offered in evidence by plaintiff was the only notice ever served on the defendant company and that no notice was ever served on Emily Gast—no notice of any kind.

Cross-examination by Mr. Rodgers:

Q. When you refer to Jordan avenue as touching the north line of your property, you mean the north line of the property which lies north of the property involved in the present suit?

A. Yes, sir.

88 Q. Now, on the property involved in this suit and the property that you have described here by metes and bounds, there is located about three or four residences; that is a fact, isn't it?

A. Yes, sir.

Q. Those residences are reached by a private way going south from Hornsby avenue?

A. Yes, sir.

Q. About how far distant from Broadway is that private way leading to those residences?

A. About seven hundred feet.

The Court: That is marked on the plat "Gast Place."

Witness: Here it says "Gast Place Private Cinder Road."

By Mr. Rodgers:

(Q.) Those residences are occupied by you and members of the Gast family?

A. Not entirely, but they were, all members of the Gast family.

Q. To the east of those residences and to the east of the red line running through this property, what have you on the property?

A. We have what is known as an amusement garden.

Q. A summer garden. That is a place where there are tables and chairs and where you have music?

A. Yes, sir.

Q. And serve refreshments—wine and beer?

A. Yes, sir.

Q. That is known generally as Gast's wine garden?

A. Known as Fischer's garden now.

Q. To the north of that and on this property we are talking about as being involved in this suit; you have a baseball park, haven't you?

A. Yes, sir.

Q. How much ground does that baseball park cover—about what?

A. About three hundred odd feet by four hundred odd feet.

39 The Court:

(Q.) That is indicated on the map?

A. Yes, sir.

By Mr. Rodgers:

(Q.) And in that baseball park you have seats, do you?

A. Yes, sir.

Q. And you sell them to the public for baseball games?

A. Well, we did last year. It has been leased out.

Q. It is used as a baseball park where the public may pay for seats to witness ball games played there?

A. Yes, sir.

Re-examination by Mr. Johnson:

Q. What kind of residences are those?

A. Residences occupied by my mother and myself and my brother-in-law, Mr. Reller.

Q. That is the old Gast homestead?

A. That is occupied by my mother and myself.

Q. What about the other?

A. My brother-in-law, Mr. Reller, occupies one of the other residences, and the third one was occupied by my brother until he left the city; it is now occupied by Mr. Walton.

Q. All of them belong to the Gast Realty & Investment Company?

A. Yes, sir.

Q. They are old houses, are they not?

A. Yes, sir; the newest one is ten years old.

Q. There are no division fences or anything of that kind between them?

A. No, sir.

Q. They are set up in different places in the midst of this tract where members of the family could be together?

A. Yes, sir.

Q. That ball park that Mr. Rodgers asked you about, that has just a cheap board fence around that lot, hasn't it?

A. Yes, sir; as cheap as we could make it.

Q. And used temporarily with temporary board seats?

90 Objected to.

Q. Describe, or state whether that is a permanent garden, and whether that is a place fenced around for boys in the neighborhood to play ball in, or whether it is a regular baseball park or not.

A. It was all put up as cheaply as possible, the fence as well as the grand stand.

Q. It was a sort of an attempt to get a temporary revenue out of it?

Objected to as leading; objection sustained; to which ruling of the Court counsel for defendants then and there duly excepted.

Q. What is the character of these improvements, with the exception of your family residences there, as to their being permanent or being simply temporary improvements?

Objected to as calling for a conclusion.

The Court: Let him describe what there is there.

By Mr. Johnson:

(Q.) Describe in reference to that feature of it.

A. There is a building there where you can have refreshments or drinks.

The Court:

(Q.) What is the character of it?

A. Frame building. It was erected in 1894; there was a dancing pavilion put there also, frame open building, and there is a frame building at the loop where the car turns, and there is this grand baseball park grand stand.

By Mr. Johnson:

Q. What kind of a grand stand is it?

A. Stand put up for spectators.

Q. What is it made of?

A. Wood—frame.

Q. Rough lumber?

A. Yes, sir.

Q. Do they intend to leave that there permanently?

91 . Objected to.

The Court: I do not think any of the testimony with regard to improvements is very material. The objection to the last question is sustained.

To which ruling of the Court counsel for defendants then and there duly excepted.

By Mr. Johnson:

(Q.) Now, what is this Gast Place, marked here "Gast Place Private Cinder Road"? What is that?

A. Private driveway, to have some place for wagons to go in.

Q. It is not a public street?

A. No, sir; private.

Q. Just made with ashes from a furnace?

A. Yes, sir; and there is a gate to it.

Q. Then you have a cinder path leading up to your residence?

A. Yes, sir.

Q. That is just a foot path?

A. Yes, sir.

Q. There is no street of any kind or alley through the property at all?

A. No, sir; there is not.

Q. It is all divided—subdivided and platted on every side of this tract except on the north, Hornsby avenue?

A. Yes, sir.

Q. Where the brewery is?

A. Yes, sir.

Mr. Johnson: It is admitted that of the total cost of the improvement, \$42,331.52, the city only paid \$7,974.78. That is correct?

Mr. Rodgers: That is correct.

The Court: What is the total amount?

Mr. Rodgers: \$42,331.52.

Mr. Johnson: And it is also admitted that the difference between \$42,331.52 and \$7,974.78 was taxed against the owners of the property in the district, private owners of the property.

Mr. Rodgers: I will state that in this way: That the net
92 total cost was \$42,291.52; that the city paid of that the sum of \$7,974.78, and the balance was assessed against the private property in the improved district that we are talking about; that is, the property of this defendant and of a great many others, all private property. There is some little discrepancy of forty dollars there. It is due to a deduction. There were eight days taken off at five dollars a day.

Mr. Johnson: It is admitted that at the time ordinance 23,137 was passed there was in the real estate account of the City of St. Louis more than \$17,168.00, and that that amount was also in the fund at the time the special tax bills were figured out and remained there at all times.

Mr. Rodgers: Do you want me to make an admission that the excess of that appropriation was returned to the city treasury and was not used?

Mr. Johnson: That the excess was returned to the city treasury.

Mr. Rodgers: After the \$7,974.78 was paid to the plaintiff in this case as the city's part of the cost of that work, the balance of the appropriation was returned to the city treasury and retained by the city.

Mr. Malatt: I presume that is a fact.

The defendants here rested their case.

The plaintiff, to further maintain the issues on its part, offered evidence as follows:

LEO OSTHAUS, having been called for the plaintiff and duly sworn, testified as follows:

Direct examination by Mr. Rodgers:

Q. What is your occupation?

A. Second assistant to the President of the Board of Public Improvements.

93 Q. How long have you been there?

A. In that office?

Q. Yes, sir.

A. Since 1886.

Q. I will show you a plat (plat shown to witness), which we will call "Plaintiff's Exhibit D," or this (another plat shown to witness) is the same thing. I will call your attention to that part represent-

ing the east side of Broadway where the city pumping station is located; that is designated on here as H and I of Gimblin's estate?

A. Yes, sir.

Q. Calling your attention to that, and following that property eastwardly from Broadway, do you come to any street of the City of St. Louis?

A. No, sir; there is no parallel street.

Q. There is no street parallel to Broadway on the east and behind these lots H and I?

A. No, sir.

Q. The river is over there (indicating)?

A. Yes, sir.

Q. In going from Broadway through this water works property to the river you would not cross any street at all at any place?

A. No, sir.

Q. We will take this red line on this part here (indicating) of lots H and I, and which marks off a space between it and Broadway, and I will ask you to state what that line is?

A. That line is the district line of the property we assessed for the improvement of Broadway.

Q. How far is that district line from Broadway?

A. That district line is 240.83 feet east of Broadway.

Q. How did you arrive at that distance? That is the eastern boundary of the district—this improvement district—pertaining to the city water works property?

A. Yes, sir.

Q. How did you arrive at that distance?

A. 240.83 feet is the average distance of the midway line on the opposite side west of Broadway.

94 Q. You mean by that, that you computed this irregular western line of the district and averaged its distance from Broadway?

A. Yes, sir; we located the midway line on the west side and took the average of the distances west of Broadway and the average distance is 240.83, and that is the district line on the east.

Q. You took that distance?

A. Perpendicular to the east line of Broadway.

Q. In getting at this midway line west of Broadway, state whether or not you went the whole length of the improvement district north and south and considered it the midway line of all the property west of Broadway?

A. We considered it the midway line west of Broadway from the beginning to the end of the improvement district.

Q. That, of course, included that line that runs through the Gast property and the property involved in this suit?

A. Yes, sir.

The Court:

(Q.) Do I understand that property on the east of Broadway included in the district equalled the property on the west of Broadway?

Mr. Johnson: No, sir; only here (indicating).

By Mr. Rodgers:

(Q.) Now, referring to that plat, if Jordan avenue to the north of it were extended southwardly what would it run into there?

A. Into the brewery.

The Court:

(Q.) Where is that brewery situated on the tract of property?

A. On the north line of Hornsby avenue—present Hornsby avenue.

The Court:

(Q.) That property, I believe, is owned also by this defendant?

A. No, sir; by the Independent Brewery Company.

The Court:

(Q.) That is on the north side?

A. Yes, sir.

95 Mr. Marlatt: This company owns property farther north of that.

Mr. Johnson: It is in the present improvement district, but they are not sued in this suit.

The Court: They are separate tax bills?

Mr. Johnson: Yes, sir.

By Mr. Johnson:

(Q.) In arriving at your district line west of Broadway you considered Church road as the next parallel line to Broadway, didn't you?

A. Yes, sir.

Q. From McLaran avenue north to Hornsby avenue?

A. Still further north.

Q. Practically to the proposed Wall street as shown on the map?

A. Yes, sir.

Q. To the north line of the district, that would be?

A. Yes, sir.

Q. At the time this ordinance was passed Church road wasn't open north of Hornsby avenue, was it?

A. No, sir; I don't know whether that (indicating) was open or not.

The Court: When you say "that," what do you mean?

Mr. Johnson: We are speaking of Church road.

Witness: I didn't examine the date; I know Church road was dedicated maybe four or five years ago, maybe later, from the present Hornsby avenue north.

(Q.) When you say it was dedicated——

A. It was platted out; accepted by the city.

The Court:

(Q.) You don't know whether it was opened for public use or not?

A. No, sir.

The Court:

(Q.) Your plat shows the situation at the time this ordinance was passed, or this contract made?

A. No, sir; our plat only shows the situation of the street the day we laid out the district.

96 The Court:

(Q.) At the time you laid out the district?

Mr. Johnson: No, sir; you are wrong about that.

Witness: The day we laid out the district.

The Court:

(Q.) When was that?

A. On January 12th, 1909, we received the certificate of the Street Commissioner that work was completed and the street accepted; on that day I laid out the benefited district for the improvement.

By Mr. Rodgers:

(Q.) You say that is the day you sketched it out?

A. Yes, sir.

Q. When was it entered in the books as being the official boundary of the district—when was that day?

A. Previous to January 12th, 1909.

Q. Isn't the date of that tax bill the date of your assessment?

A. That is the date we issued the special tax bill, sent the bills down to the Comptroller.

Q. Isn't that the date of your assessment?

A. Yes, sir.

Q. That is the date of the assessment?

A. Yes, sir.

Q. Then that is the date that the official boundary of the district was established, isn't it?

A. We established the district after we received the certificate of the Street Commissioner.

Q. When you say "we established the district" by what act is the district established?

A. According to the charter.

Q. What date do you say that district was established with reference to the date of this tax bill?

A. I might say February 8th; after that we couldn't make any change any more.

Q. Before that did you enter in any books of the Board of Public Improvements anything with reference to the assessment or the district?

97 A. On that date.

Q. The date, February 8th, that is the first day you entered in your official books anything with reference to the boundary in the assessment district?

A. Yes, sir.

Q. Prior to that anything you may have done was preliminary?
 Objected to.

A. Yes, sir; subject to changes.

Q. Was there any other date, of the date of the assessment?

A. The date we issued the special tax bills, that is the date of the assessment.

Q. Now, on this plat before us I notice a yellow line and red lines. The red lines indicate the boundary of the assessment district as established in the special tax department?

A. Yes, sir.

Q. Now, the yellow line indicates the boundary of the district as projected on the plat of the Street Commissioner, which was used and filed prior to the passage of the ordinance?

A. Yes, sir.

Mr. Rodgers: For the convenience of the Court I would make the suggestion that a yellow line also be put at the northern boundary of the district to indicate the little difference there between the boundary located by the tax assessor and the projected boundary in the Street Commissioner's plat.

Mr. Johnson: We have no objection.

By Mr. Marlatt:

Q. Have you seen this plat before, "Defendant's Exhibit B"?

A. Yes, sir; it seems to me it is a copy of the blue print of the district laid out by the street department.

Q. You will notice it doesn't show Church road open north of Hornsby avenue?

A. Yes, sir.

98 Q. You will notice it shows Hornsby avenue extending north, making a turn north, and then running northeast?

A. Yes, sir.

Q. Then there was, at the time that ordinance was passed, a jog in Hornsby avenue?

A. Yes, sir.

Q. Which was east of Church road as now extended?

A. Yes, sir.

Q. And Church road didn't extend, at the time the ordinance was passed, north of Hornsby avenue, did it?

A. I suppose so; this (indicating) was not open.

Q. And the benefit district, as platted by the Street Commissioner, shows a corresponding jog to the east?

A. Yes, sir.

Q. To allow for the jog in Hornsby avenue?

A. Yes, sir.

Q. That is not shown in the district as finally adopted by your office?

A. No, sir.

Mr. Rodgers:

Q. But will be shown by a yellow line correcting the plat?

A. Yes, sir.

By Mr. Marlatt:

Q. From the north line of the benefit district to Gimblin road, on the east side of Broadway, the district line was at the rear end of the lots?

A. Yes, sir.

Q. At the west line of the alley?

A. Yes, sir.

Q. In the middle of the block?

A. Yes, sir.

Mr. Rodgers:

Q. Now, one more question: At the time this benefit district was established in the special tax department, was this Church road—was it then an open street there to the northern boundary of the improvement district?

A. Yes, sir.

Mr. Marlatt:

Q. Hornsby avenue, as it formerly existed, is shown by the shaded lines on this Plaintiff's Exhibit D?

A. Yes, sir.

Plaintiff offered in evidence said Plaintiff's Exhibit "D."
99 The original of this plat is, by stipulation herein set out, filed in this court and an exact copy of said original is attached to the end of this abstract, showing by the yellow lines the district as originally laid out at the time of the passage of the ordinance, and showing by the red lines the district as it was finally laid out after the completion of the work.

The following stipulation, signed by attorneys for both parties, was introduced in evidence:

Stipulation.

It is stipulated between the plaintiff and the defendants in the above-entitled cause that the following facts are admitted to be true by both parties:

1. That the Board of Public Improvements recommended ordinance No. 23137 to the Municipal Assembly of the City of St. Louis in compliance with the provisions of the charter of the city; that at the time the said Board of Public Improvements recommended said ordinance the President of the Board of Public Improvements endorsed on said ordinance an estimate of cost in words and figures as follows:

"House Bill No. 71, Session 1907-8.

Office of the Board of Public Improvements.

ST. LOUIS, — 190—.

The Board of Public Improvements estimates the cost of the entire work contemplated by the within ordinance to be done at the expense of the city for proportion of cost against city property seven-teen thousand one hundred and sixty-eight dollars, and at the ex-pense of property owners, inclusive of city's proportion, at forty thousand nine hundred and ninety-two dollars.

A. J. O'REILLY,
President B. of P. I.

Attest:

W. B. DRYDEN, *Secretary.*"

100 2. That the contractor, Schneider Granite Company, was notified by the Street Commissioner of the City of St. Louis on August 6, 1908, to begin work under contract 8105.

3. That on January 12, 1909, the Street Commissioner certified that the work done by said contractor, Schneider Granite Company, under contract No. 8105 was complete and certified to the quantity and measurements of said work.

HICKMAN P. RODGERS,
Attorney for Plaintiff.
JOHNSON, HOUTS, MARLATT &
HAWES,
Attorneys for Defendant.

This was all the evidence offered in the case.

Whereupon the defendants prayed the Court to give the following declaration of law:

At the close of the whole case the Court instructs that under the pleadings and the evidence in this case the plaintiff is not entitled to recover and the finding must be for the defendants.

Which declaration of law the Court refused to give; to which refusal by the Court to give their declaration of law thus prayed, the defendants, by their counsel, then and there duly excepted.

And thereafter, on November 23, 1910, at the October, 1910, Term of said court, the Court found the issues in favor of the plain-tiff and judgment was rendered in favor of the plaintiff against the property described in the petition for \$16,713.74; to which action of the Court defendants then and there duly excepted.

And thereafter, on November 26, 1910, at the same October, 1910, Term of said court, and within four days after the said finding and judgment, the defendants Gast Realty & Investment Com-
101 pany and Emily Gast filed their motion for a new trial, which is as follows (omitting caption):

Motion for a New Trial.

Now come the defendants Gast Realty & Investment Company and Emily L. Gast, by their attorneys, and move the Court to set aside its findings and judgment in the above cause and grant defendants a new trial herein because of the following errors, each of which errors was prejudicial to the defendants' rights upon the merits.

Said defendants assign the following errors in support of their motion, namely:

1. The finding and judgment are against the weight of the evidence.
2. The finding and judgment are against the evidence.
3. The finding and judgment are against the law.
4. The finding and judgment are against the law and the evidence.
5. The Court erred in refusing and overruling the demurrer to the evidence offered by the defendants at the close of the plaintiff's case.
6. The Court erred in refusing and overruling the demurrer to the evidence offered by defendants at the close of the whole case.
7. The Court severally erred in giving each one of the instructions given at the instance of the plaintiff.
8. The Court severally erred in giving each one of the instructions given by the Court of its own motion.
9. The Court erred in admitting incompetent evidence for plaintiff over the objection of defendants.
10. The Court erred in admitting irrelevant evidence for plaintiff over the objection of defendants.
- 102 11. The Court erred in excluding competent and relevant testimony offered in behalf of defendants.
12. The Court erred in not declaring the law to be, both at the close of plaintiff's case and at the close of the whole case, that on the pleadings and evidence the finding and judgment should be for the defendants.
13. On the pleadings and evidence in this case the finding and judgment of the Court should have been for the defendants instead of for the plaintiff.
14. The Court has by its finding and judgment erroneously interpreted Section 14 of Article VI of the Charter of the City of St. Louis.
15. The interpretation placed by this Court in its finding and judgment upon Section 14 of Article VI of the Charter of the City of St. Louis makes it illegal and void because it deprives defendants of the equal protection of the laws and deprives defendants of their property without due process of law, contrary to Section I of Article XIV of the Amendment to the Constitution of the United States, and contrary to Section 20 of Article II of the Constitution of Missouri and contrary to Section 30 of Article II of the Constitution of Missouri.

GAST REALTY & INVESTMENT
COMPANY.

EMILY GAST, *Defendants,*

By JOHNSON, HOUTS, MARLATT &
HAWES, *Attorneys.*

St. Louis, December 17th, 1909.

This bill is hereby amended by adding the name of Emily Cast as owner and by describing the property upon which the said bill is a lien as follows:

A tract of land in U.S. Survey 1927 and 728, Vol. 1, 48, formerly pg. 84.

Beginning in the west line of Broadway at a point 132.50 feet north of the north line of McLaran Ave., thence westwardly parallel with and 132.50 feet north of the north line of McLaran Ave. 115 feet to the public alley in C.B. 5209, thence northwardly along the east line of said alley 7.5 feet, thence westwardly along the north line of said alley 75 feet to property now or formerly owned by Huettemann, thence northwardly along the east line of said property 125 feet, thence westwardly along the north line of said property 30 feet, thence southwardly along the west line of said property 125 feet to the north line of alley in C.B. 5209, thence westwardly along the north line of said public alley 107.18 feet to property now or formerly owned by Luedinghaus, thence northwardly along the east line of said property 435 feet, thence westwardly along the north line of said property 101.53 feet to the midway line between Broadway and Church Road, thence northwardly along said midway line 205.02 feet to the south line of Bellevue Addition, thence eastwardly along said south line of Bellevue Addition 70.78 feet to the east line of said Addition, thence northwardly along the east line of said Addition 445.69 feet to the south line of Hornsby Ave., thence eastwardly along the south line of Hornsby Ave. 418.92 feet to the west line of Broadway, thence southwardly along the west line of Broadway 1083.88 feet to the place of beginning.

Maxime Reber

A.J.O'Reilly

President of the Board of Public Improvements.

Registered and Countersigned
by:

105

James Y. Player,

B. J. Taussig

Comptroller

OK JJC

MAPS

TOO

LARGE

FOR

FILMING

Which motion for a new trial was by the Court duly continued until the December, 1910. Term of said court, and on December 19, 1910, at the December, 1910, Term of said court, the plaintiff remitted \$193.62 of said judgment and a new judgment was entered against defendants' property for \$16,520.12, and the Court on said day overruled said motion for a new trial; to which ruling and order of Court rendering such judgment and overruling of said motion for a new trial the defendants, by their counsel, then and there duly excepted.

And thereafter, on February 4, 1911, and at the same December, 1910, Term of said court at which said motion was overruled, the defendants Gast Realty & Investment Company and Emily Gast deposited ten dollars docket fee with the clerk of said court, as required by law, filed an affidavit for appeal, which was allowed them to the Supreme Court of Missouri, and they were given ten days in which to file their appeal bond in the sum of \$16,000.00, and said defendants were given sixty days in which to file their bill of exceptions, and on February 10, 1911, within the time allowed by the Court defendants filed their appeal bond in the sum of \$16,000.00, which bond was approved by the Court on that date. And thereafter, on March 31, 1911, at the February, 1911, Term of said court, and within the time allowed defendants by the Court and its order of February 4, 1911, to file their bill of exceptions, the said Court by an order duly entered of record granted defendants thirty days additional in which to file their bill of exceptions.

Inasmuch as the foregoing matters do not appear of record in this cause, and in order that they may be preserved and presented on appeal, the defendants, within the time heretofore allowed them, tender this their bill of exceptions in this cause, and pray that the same may be allowed, signed, sealed, filed and made a part of the record herein, which is accordingly done on this 5th day of April, 1911.

DANIEL D. FISHER, [SEAL.]
*Judge Circuit Court of the City of St.
 Louis, Mo., Sitting in Division No. 2.*

Approved:

HICKMAN P. RODGERS,
Attorney for Plaintiff.

The appellant has filed a certified copy of the judgment and order granting an appeal in said cause in the Supreme Court of Missouri, and the appellant tenders the foregoing abstract of the record in lieu of a complete transcript, as provided by the statutes and rules of this court.

JOHNSON, RUTLEDGE & LASHLY,
Attorneys for Appellant.

(Here follow special tax bill and map, marked pages 105 to 107, inc.)

108 In the Supreme Court of Missouri, Division No. 2, October Term, 1913.

No. 16439.

THE SCHNEIDER GRANITE COMPANY (a Corporation), Respondent,
vs.

GAST REALTY & INVESTMENT COMPANY (a Corporation) and EMILY
GAST, Appellants.

Appeal from the Circuit Court, City of St. Louis, Mo.—Daniel D.
Fisher, Judge.

RESPONDENT'S CORRECTIONS OF AND ADDITIONS TO APPELLANTS'
ABSTRACT OF THE RECORD.

Corrections.

The amendment to the special tax bill is signed

MAXIME WEBER.

A. J. O'REILLY,

President of the Board of Public Improvements.

Registered and countersigned by

JAMES Y. PLAYER.

B. J. TAUSSIG, *Comptroller.*

O. K.

J.J. C.

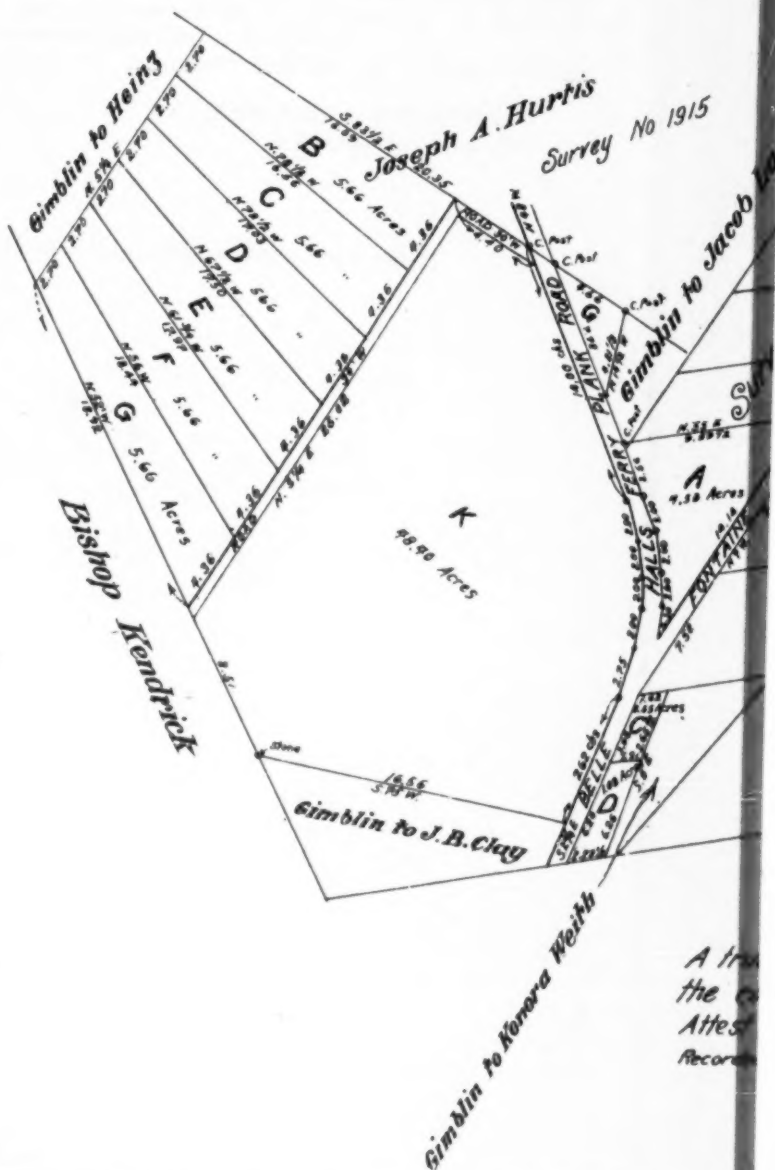
109 The amended answer of defendant Gast Realty and Investment Company shown by appellants' abstract of record contains the following words which cannot be found in the original answer in the files of this cause, viz:

On page 20, beginning with the line next to the bottom of the page, "including the property of defendant described in plaintiff's amended petition."

There are other mistakes of a minor nature in said abstract, but since they do not seem to play any part in the contentions in the case we make no reference to them.

Additions.

The report of commissioners mentioned on page 57 of appellants' abstract shows that they divided the ground into portions lettered from "A" to "K" and illustrated the same with a plat. This report recites that, "To Mary Elizabeth Gimblin we apportion and set off lot marked H on said plat." Lot I was in similar terms apportioned and set off to Davis Gimblin; and a portion assigned to another was described as bounded "on the west by lots H and I allotted to Mary



Subdivision
of
H. Gimblin's Estate
under the direction of commissioners

Surveyed by Ed C. Schultze

#211
East R
Schneid



Joseph Hebert

Survey No 281

A - John S & H. L. Gimblin
B - George W. Gimblin
C - Barton D. Gimblin
D - Nancy Jane Smith
E - Edward Gimblin

F - Charles Peter Lang
G - Biedner, Walter & Espens
H - Davis Gimblin
I - Mary Elizabeth Gimblin
K - Wm Elizabeth Gimblin

A true copy of the Plot accompanying
the commissioners report

Attest: - Charles A. Mantz, Clk.

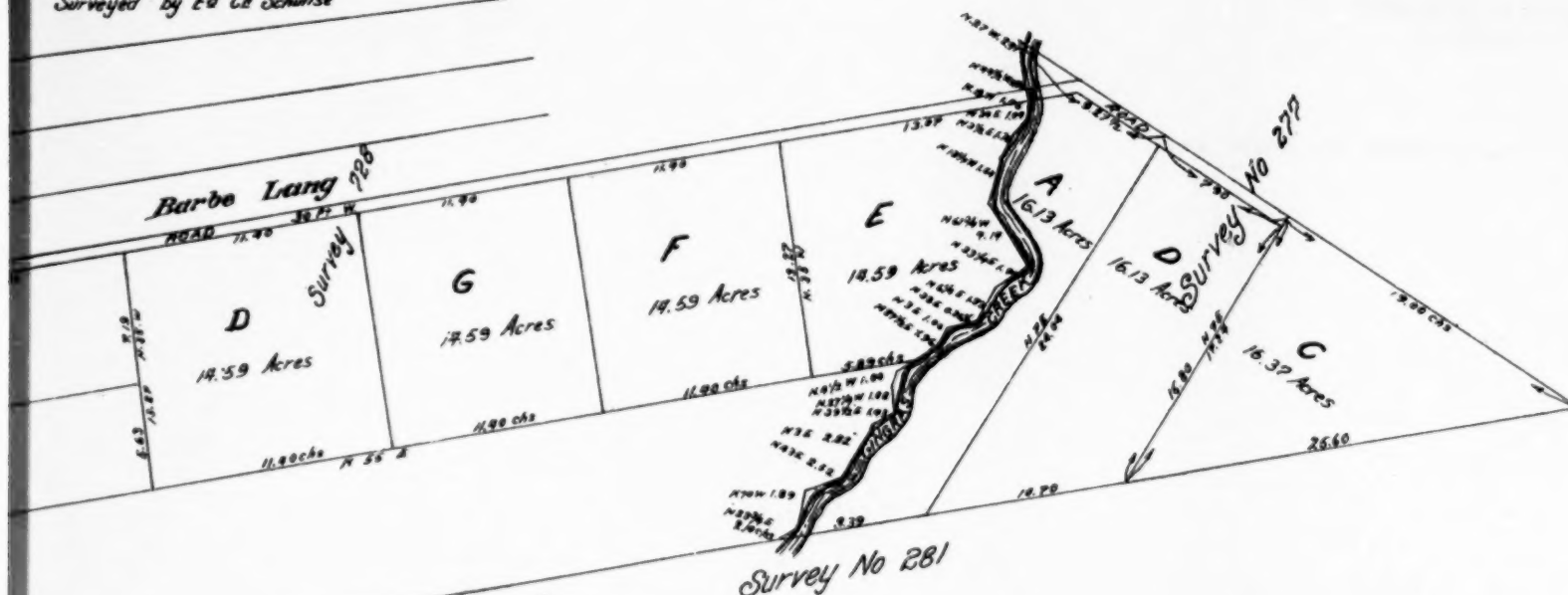
Recorded in Recorder of Deeds Office Book No 158 Pages 939 & 935

Subdivision of Gimblin's Estate

the direction of commissioners

Surveyed by Ed G. Schultze

#211
East R & L Co
v
Schneider & Co



Joseph Hebert

Survey No 281

A - John S & H. L. Gimblin
B - George W. Gimblin
C - Barton D. Gimblin
D - Nancy Jane Smith
E - Edward Gimblin

F - Charles Peter Lang
G - Biedner, Walter & Espenschied
H - Davis Gimblin
I - Mary Elizabeth Gimblin
K - Wm Elizabeth Gimblin

at accompanying

A. Mantz, CLK.

Office Book No 158 Pages 939 & 935

Elizabeth and Davis Gimblin." The report also mentions "that two roads for the use and benefit of the several parties" were laid out. A copy of said plat, recorded with the report, in the office of the Recorder of Deeds of St. Louis County, in General Record Book 158 at page 434, is attached hereto. There is nothing on the pages of the book where said plat and report are recorded to show that said plat ever received the endorsement of the Board of Public Improvements of the City of St. Louis.

The contract between respondent and the city is dated October 23rd, 1907.

RODGERS & KOERNER,
Attorneys for Respondent.

(Here follows map marked page 111.)

112 In the Supreme Court of Missouri, April Term, 1914,
Div. No. 2.

And thereafter, to-wit, on March 24th, 1914, the following further proceedings were had and entered of record in said cause:

In the Supreme Court of the State of Missouri, October Term, 1913,
Division Two.

No. 16439.

THE SCHNEIDER GRANITE COMPANY, Respondent,
vs.
GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Appellants.

This is a suit upon a special tax bill in the sum of \$14,522.65 and interest, issued by the City of St. Louis to the plaintiff contractor and against the property of defendants, as in part payment for the improvement of that portion of Broadway street lying between a line about 285 feet south of Pelham Avenue and Hornsby Avenue in said City. Trial was had in the Circuit Court of the City of St. Louis, resulting in a judgment for plaintiff for the full amount with interest. Defendants have perfected an appeal to this court. By the St. Louis Charter, it is provided that special assessments for street improvement shall be levied, one-fourth against the land fronting upon or adjoining the improvement and three-fourths proportionately against all the land lying within the benefit district to be fixed as provided by said charter. Said benefit district is established as follows:

"A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be drawn as to include the entire depth of all lots fronting on the street to be improved. If the line drawn midway as above described would divide any lot lengthwise or approximately lengthwise, and the average distance from the midway line so drawn to the nearer boundary line of the lot is less than twenty-five feet, the district line shall in such case diverge to and follow the said nearer boundary line. If there is no parallel or converging street on either side of the street to be improved, the district lines shall be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located. Provided that if any property in a district established as herein provided is not liable to special assessment, the city shall pay the propor-

tion of cost of the improvement which would have been assessed against such property. All of the property in the lots, blocks or tracts of land lying between the streets to be improved and the district lines established as above specified, shall constitute the district aforesaid. * * * The word "lot" as used in this section, shall be held to mean the lots as shown by recorded plats of additions or sub-divisions, but if there be no such recorded plat, or if the owners of property have disregarded the lines of lots as platted, and have treated two or more lots or fractions thereof as one lot, then the whole parcel of ground, or lots so treated as one, shall be regarded as a lot for the purposes hereof."

Charter of the City of St. Louis, Art. VI, Sec. 14.

The property involved in the present tax bill is upon the west side of the improved street, having a frontage thereon of 1083.88 feet and extending westward to a depth varying from 327 feet to approximately 493 feet. The nearest public street west of the improved street, and also west of the land involved in this tax bill, is Church road which is approximately 986 feet west of Broadway at this place.

Appellants make no claim that the work of said improvement was not properly done as provided by the contract and specifications but seek to defeat a recovery by reason of certain alleged irregularities in the fixing of the boundaries of the benefit district; in the issuance of the tax bill and the giving notice of its issuance. The different defenses pleaded may be briefly stated as follows:

1. That the assessment district fixed by said city was illegal and improper and not in conformity with the provisions of the city charter in this:

(a) A portion of the western boundary of said benefit district was placed half-way between Broadway and Church road whereas Church road was not a parallel or converging street to Broadway within the meaning of said charter. That in time this property will be intersected with other streets parallel and nearer Broadway; that if Section 14 of Article VI of the Charter of the City of St. Louis, when correctly construed, authorizes the fixing of the western line of said district at the place it was in fact located in the instant case

114 then said charter provision is illegal and void because of being in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States and Sections 20 and 30 of Article II of the Constitution of Missouri; that said portion of the west boundary of said district should have been located "at a distance west of Broadway equal to the average distance of the district line on the east side of the improved street" as provided by the Charter when there is no parallel or converging street on one side of the improved street; that if the western district line had been drawn a distance from Broadway equal to the average distance of the opposite boundary line it would have been much closer to Broadway and would have omitted from the assessment district a large portion of the property included in said tax bill.

(b) That the eastern boundary of the district should have been extended so as to have taken in the entire depth of lots "H" and "I"

of the subdivision of Gimblin's estate fronting upon the east side of the improved street, because the same are lots within the meaning of the Charter. (Note: This would have enlarged the benefit district and decreased the amount of defendant's tax.)

(c) At the time of the passage of the ordinance authorizing the improvement, a street then known as Hornsby Avenue ran about 15 feet parallel with the northern end of the improved street. That before the improvement was finished this short parallel street was vacated and another parallel street about 155 feet farther west was opened by extending Church road northward and that the western boundary line of the district at this place was fixed half way between Broadway and the new extension of Church road instead of half way between Broadway and Hornsby Avenue as it existed at the time the ordinance was passed. (Note: This had the effect of taking more land into the assessment district but land other than that involved in the present tax bill.)

2. That the ordinance providing for the improvement and the issuance of special tax bills in payment therefor was in part as follows:

"The total cost of the foregoing work and all proper connections and intersections required (except so much thereof as the railway company having tracks on said street is by law obligated to pay, and except, further, so much thereof as is provided to be paid by the City of St. Louis by section 5 of this ordinance) shall be ascertained and be levied and assessed as a special tax upon all the property within a district defined and bounded by Section 14 of Article VI of the Charter of the City of St. Louis.

Section 5. Whereas, In the district aforesaid there is located St. Louis Water Works property of the City of St. Louis which is not liable to special assessment, and, whereas, the proportion of cost of the aforesaid improvement which would have been assessed against said property of the city were it not exempt from the assessment amounts to \$17,168.00. There is hereby appropriated and set apart out of real estate account for city's proportion of cost against property of the city for reconstructing and improving streets, alleys or sidewalks said sum of \$17,168.00 to pay for the city's proportion of said cost."

That the amount finally paid by the city on property included in the district exempt from special assessment was \$7,947.78 instead of \$17,168.00 the amount appropriated and that by reason thereof the remainder of the property in the assessment district had to pay approximately \$10,000.00 more in special tax than contemplated and provided by said ordinance and that by reason thereof said tax bills including the one in suit were rendered illegal and void.

3. That the contract which plaintiff entered into with the city for the performance of said work pursuant to the terms of said ordinance provided that the "property in the benefit district exclusive of the property belonging to the city, should only be charged with the difference between the total cost of said improvement," to-wit, \$42,291.62

and the sum to be paid by the city authorities, to-wit, \$17,168. but that the City authorities failed to deduct said sum of \$17,168, before assessing the assessible property in said dis-

strict and that by reason of said ordinance and contract plaintiff is estopped to claim that special tax bills could be issued by the city for more than the sum of \$42,291.52 less said \$17,168 and that by reason of such error the said tax bill is illegal and void.

4. That said tax bill is void because it did not describe with sufficient certainty the property against which it purported to be issued; and that said tax bill was never amended in any manner provided by law.

5. That no notice of the issuance of any special tax bill against the property referred to in the amended petition was ever given to defendants.

There is little, if any, dispute as to the controlling facts. Such additional facts as shall become necessary to an understanding of the legal questions involved will be stated in connection with the discussion of the respective points.

Opinion.

I.

It is contended that that portion of the western boundary of the benefit district affecting the property involved in the present tax bill was erroneously fixed one half way between Broadway and Church road and further that if the Charter of St. Louis be construed to authorize the fixing of the boundary line in such manner then said Charter provision is in conflict with the Fourteenth Amendment to the Constitution of the United States and with Sections 20 and 30 of Article II of the Constitution of Missouri.

117 The undisputed facts show that Church road which is approximately 900 feet distant, is the nearest parallel street to that portion of the improved street upon which the land involved in the present tax bill, fronts.

The point here raised has been fully discussed and directly passed upon by this court in a number of decisions. No present reason appears why the subject should again be discussed at length, but for the purpose of the present case, it is sufficient to say that the rule has become firmly established by former opinions of this court to the effect that the charter of St. Louis does provide for the fixing of the boundary line of the benefit district as the same was fixed at the place above mentioned in the case at bar, and that such charter provision does not conflict with any of the above mentioned constitutional provisions. Granite Bituminous Paving Co. vs. Fleming, 251 Mo. 210; Gilsonite Co. vs. St. Louis Fair Assn. 231 Mo. 589; Fruin-Bambrick Construction Co. vs. St. Louis Shovel Co. 211 Mo. 524.

II.

It is further contended that the benefit district should have been extended so as to have taken in (to their full depth) certain parcels of ground owned by the City and occupied by its Water Works plant; said property fronts upon the improved street and is described as Lots "I" and "H" of H. Gimblin's estate in partition. Each of said parcels

of ground contains about 13 acres of land and has a depth of about 1400 feet extending eastward from the improved street. From the evidence it appears that there was no parallel or converging street east of that portion of the improved street upon which this property fronts. The district line at this place was drawn parallel with and a distance of 240 feet from the improved street; said 240 feet being the average distance of the district line on the opposite side of the street. If the two above mentioned tracts of land are "lots"

118 within the meaning of the City charter, then the district line should have been extended so as to take in the full depth thereof. This would have greatly increased the area of the benefit district and therefore have greatly reduced the amount of tax assessed against the land involved in the present tax bill. If, on the other hand, said tracts of land are not "lots" within the meaning of the Charter, then the district line was properly located. The tracts of land marked "I" and "II" were formerly a part of the H. Gimblin's estate or farm. After said Gimblin's death his estate consisting of several — acres was partitioned. Commissioners in partition divided the estate into ten separate tracts of land designating the separate tracts upon a survey by letters respectively from "A" to "K," both inclusive. These separate divisions varied in size, ranging from about four acres to about forty-eight acres and the separate parcels were allotted to the respective parties in partition. A survey was made of the division of the estate and the survey or plat accompanying the Commissioner's report in partition was recorded in the office of the Recorder of Deeds of St. Louis County. There is nothing to show that said plat was ever approved or accepted by the Board of Public Improvements of the City of St. Louis. We think it clearly apparent that said tracts of ground are not "lots" within the meaning of the charter, and that therefore the district line at that place was properly located. In the case of *The Collier Estate vs. Western Paving & Supply Company*, 180 Mo. 362, 1. c. 385, where a situation similar to the one in the case at bar was involved, the Court in Banc, speaking through Gantt, J., said "As to the claim that this tract was divided into lots and the plat recorded, because in the partition suit portions of it were allotted to the survey and these allotments recorded with the Commissioner's deed, we think it is untenable. There is no pretense that such

119 allotment plat was approved by the Board of Public Improvements and recorded in the plat books in the recorder's office."

III.

It is urged that the tax bill is void by reason of the location or fixing of that portion of the western boundary line which extends southward a distance of approximately 240 feet from the northwest corner of the benefit district. At the time the ordinance authorizing the improvement was passed, Hornsby Avenue ran parallel to Broadway at this point. While the work was in progress and before the work was completed, Hornsby Avenue was vacated and Church road was extended northward so that at the close of the work this extension of Church road was the next parallel street along this portion of

the improved street. This extension of Church road was approximately 150 feet farther west of Broadway than was Hornsby Avenue. The district line at this place was placed one half way between Broadway and this extended parallel — portion of Church road thereby including in the benefit district a strip of ground about 70' x 240' that would not have been included in the benefit district had the district line at this point been fixed half way between Broadway and the next parallel street existing at the time the ordinance was passed. This strip of ground thus taken into the benefit district was no part of the land against which the present tax bill was issued. This being true defendant, so far as his property is involved in the present suit, was benefitted and not harmed by reason of the boundary line being fixed where it was. Three-fourths of the cost of the improvement is assessed proportionately against the area of all the land in the benefit district. The larger this benefit district the smaller the assessment per square foot. The fixing of the district line as it was fixed had the effect of bringing more land in to the district, therefore the land in the present tax bill was assessed for a less amount than if the line had been fixed at the place contended for by appellants. Under such circumstances, appellants should not be permitted to urge such irregularity against the validity of the present tax bill but that question should be left for determination in the suit involving the validity of the tax bill embracing that particular tract. The suit involving the validity of the tax bill embracing that particular tract is now under submission in this Division of the Court and that point will be discussed therein.

IV.

The ordinance authorizing the improvement made provision for an appropriation of \$17,168 out of the real estate fund of said City, with which to pay the City's proportion of the cost of said improvement. The charter provided "that if any property in a district established as herein provided is not liable to special assessment, the City shall pay the proportion of cost of the improvement which would have been assessed against such property." In the case at bar the amount to be paid by the City could only be determined by the amount of the City's property which was properly included within the benefit district. The district boundaries were fixed automatically by the Charter. An ordinance could not add to or take from the benefit district. *Collier Estate vs. Western Paving & Supply Company*, supra, 1 c. 375.

The purpose of the ordinance in the respect here discussed was to make an appropriation out of which the city's proportionate part could be paid. The fact that the ordinance appropriated \$17,168, with which to pay its proportion could in no manner obligate the City to pay that amount unless the City's legal share in fact equalled that amount. When the work was completed and the City authorities were ready to issue the tax bills it was ascertained that the City's

correct proportion was \$7,994.78. The appropriation of
 121 \$17,168 was made by the Municipal Assembly, evidently
 under the mistaken idea that the benefit district would ex-
 tend to the full depth of tracts "I" and "H" owned by the City.
 The identical point here raised was passed upon by this court in the
 case of *Perkinson vs. Weber*, 251 Mo. 186. In that case, Brown, P.
 J., speaking for the Court said:

"The appropriation mentioned turned out to be more than a thou-
 sand dollars larger than was necessary to cover the City's part of im-
 proving Twentieth Street, but that did not harm defendants in any
 way. * * * Because the Municipal Assembly acted with abund-
 ant caution in appropriating a larger sum than was necessary
 would constitute no warrant for spending the surplus of that appro-
 priation in paying special taxes on property of defendants or other
 private persons. All of the costs * * * which were legally
 chargeable against the City of St. Louis were paid out of the appro-
 priation, and the contention of defendants that the remainder of said
 appropriation should have been applied on said improvement must
 be disallowed."

It is further insisted by appellants, however, that the ordinance
 in appropriating a certain amount with which to pay the City's
 portion thereby limited the amount for which special tax bills
 could be issued against private property in the district to the dif-
 ference between the total costs and the amount so appropriated.
 We are unable to agree with this construction of the ordinance.
 Section Four of the ordinance in providing for the issuing of
 special tax bills to pay for the total cost of the improvement (less
 the amount to be paid by the street railway company and the amount
 to be paid by the city by section 5 of the ordinance) expressly states
 that the benefit district contemplated by the ordinance is the district
 as fixed by Sec. 14, Article VI of the Charter. And by providing
 for deducting from the total cost the amount to be paid by the City
 as provided by Section 5 of the ordinance, (said Sec. 5 not fixing
 the City's liability but only appropriating to pay its proportion as
 fixed by the district under the Charter) said ordinance should not
 be construed to mean that the legal amount assessable against the
 remainder of the property in the benefit district should be
 122 less than its legal share. It is true that it was necessary
 that the ordinance make an appropriation for paying the
 City's part but this provision can not fix the City's proportionate
 part. It can only provide the funds out of which the City's propor-
 tionate part (otherwise fixed) can be paid. What is said in this
 paragraph as to the construction to be placed upon said ordinance
 will also apply to the construction to be placed upon the contract
 between the City and the contractor which contract was based upon
 the ordinance.

V.

The charter provides that tax bills "may be collected of the owner
 of the land and in the name of and by the contractor, as any other
 claim in any court of competent jurisdiction, with interest at the

rate of six per cent per annum after thirty days' notice of its issuance as hereinafter provided. * * * It shall be the duty of the City Marshal, at the request of the holder or owner of any tax bill issued under this charter, to serve upon the party or parties named in such tax bill a notice of the issuance thereof." etc.

Pursuant to the above provision for giving notice, and in due time, the contractor caused to be served upon the defendant named in the tax bill the following notice:

"Special Tax Bill Notice.

Gast Realty & Investment Co.—Owner.

You are hereby notified that special tax bill No. 17,961 for \$14,-522.65, date Feb. 8, 1909, has been issued to Schneider Granite Co., Contractors, under ordinance No. 23137, contract No. 8105, for work done on Broadway between a line about 285 feet south of Pelham avenue and Hornsby avenue, and chargeable against property described in said special tax bill as follows:

Lot No. — in city block No. — Vol. 1, pa. 64, said ground having an aggregate front of 1085.71/1083.88 feet, by a depth of 327.18/-418.92 feet, bounded north by Hornsby avenue, east by Broadway, south by alley et al. and west by Luedinghaus Jr., et al.

This bill is payable as provided by Section 25, Article VI, of the City Charter, and the Lafayette Bank, Broadway and Merchant St., has been designated as the place of payment thereof, where payment of the bill in full may be made without interest within thirty days after service of this notice; otherwise, in accordance with said section and article.

Payment thereof is now demanded.

SCHNEIDER GRANITE CO., *Contractors.*
By B."

123 It is contended that the above notice is insufficient by reason of the fact that the property is not correctly and completely described. It is true that the property is not fully described. However, the purpose of the notice is to inform the person named in the tax bill of the "issuance thereof", so that he may pay the same without interest at any time within thirty days after receiving said notice. The description given says the property is bounded on the north by Hornsby avenue and on the east by Broadway. The same could not be said of any other piece of property in the city. However, the charter does not provide that the notice shall contain a description of the property. The description given in the present notice was sufficient to apprise the owner that it was his land against which the tax bill was issued. The notice gave the date of the tax bill, its amount, and the number of the ordinance and contract authorizing the work and also designated the street improvement for which the tax bill was issued and stated at what bank the tax bill was payable. We can not conceive how appellant could have been misled in any way or how its rights could have been impaired

by reason of any information which the notice failed to impart. It gave sufficient information of the "issuance" of the tax bill and was a sufficient compliance with the charter provision as to such notice.

After the above notice was given, defendant Emily Gast became the record owner of a small portion of the property against which this tax bill was issued. And later the tax bill was amended by giving an accurate description of the property by metes and bounds and by adding the name of Emily Gast as owner. No notice was ever given said Emily Gast. But the charter makes no provision for notifying subsequent purchasers of the property of the issuance of the tax bill but only provides for notice of its issuance to be given the person named in the tax bill at the time the notice is given.

124

VI.

The tax bill was issued February 8, 1909, and the above notice of its issuance was served upon appellant corporation March 3, 1909; on December 17, 1909, the tax bill was amended by correctly describing the property by metes and bounds and by adding the name of appellant Emily Gast who had become the record owner of a portion of the land after the issuance of the tax bill. This suit was instituted afterwards and is based upon the amended tax bill. This amendment was made and endorsed by the same city authorities that issued the original tax bill.

It is well settled in this state that irregularities occurring in the issuance of tax bills may be corrected by amendments thereto made by the same persons who originally issued the same. *Morley vs. Weakley et al.*, 86 Mo. 451; *Strodler, Adm'x vs. Roth, et al.*, 59 Mo. 400; *Vieths vs. The Planet Property & Financial Company, et al.*, 64 Mo. App. 207. Said amendment was not only permissible under the authorities but it was a very proper and necessary step for the purposes of the tax lien and the regularity of a possible sale of the land under a judgment rendered thereon.

The judgment is affirmed.

Roy, C., concurs.

FRED L. WILLIAMS, C.

Per Curiam: The foregoing opinion of Williams, C., is adopted as the opinion of the Court. All the Judges concur.

125

In the Supreme Court of Missouri, Division No. 2.

"SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Appellants.

Appeal from the Circuit Court, City of St. Louis.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of

and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellants its costs and charges herein expended, and have therefor execution. (Opinion filed.)

126 In the Supreme Court of Missouri, Division No. 2.

And thereafter, to-wit, on April 3rd, 1914, the following further proceedings were had and entered of record in said cause:

"SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Appellant.

Come now again the said appellants, by attorney, and file their motion for rehearing herein."

Which said motion for rehearing is in words and figures as follows:

127 In the Supreme Court of Missouri, Division No. 2, October Term, 1913.

No. 16439.

SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Appellants.

Appellants' Motion for Rehearing.

Come now the appellants and respectfully pray the Court to grant them a rehearing in the above cause. And for grounds of their said motion appellants assign that certain questions decisive of this case and duly submitted by counsel have been overlooked by the Court, and further assign that the decision of the Court is in conflict with certain express Statutes and Ordinances. Said matters are as follows, to-wit:

128 I.

The court in its opinion overlooked certain provisions of Ordinance 23,137 of the City of St. Louis, and as a result the decision is in conflict with the express provisions of said Ordinance, and with the provisions of Section 15 of Article VI of the Charter of the City of St. Louis and Section 27 of Article VI of the Charter.

Section 15, Article VI of the Charter provides:

"All ordinances recommended by said Board shall specify the character of the work, its extent, the material to be used, the manner

and general regulations under which it should be executed, the fund out of which it shall be paid for, etc."

Section 27 of Article VI of the Charter provides that contracts for improvements, unless made in compliance with the Charter provisions, shall be held as illegal and void.

Ordinance No. 23,137 provides the fund out of which the improvements shall be paid. It provides that \$17,168.00 shall be paid by the City of St. Louis and that only the difference between the total cost and said amount shall be assessed against the adjacent property.

The court in its opinion states that the purpose of the ordinance in the respect here discussed was merely to make an appropriation out of which the city's proportionate part could be paid. The court in its opinion overlooks the fact that the ordinance had another purpose, to-wit: specifying the funds out of which the entire improvements should be paid. This was an essential part of the ordinance, as no tax can be valid without such specification. And in carrying out this purpose said Ordinance provides that the adjacent property should only bear an expense equal to the total cost, less

129 \$17,168.00. Whereas in fact the tax bills issued by the City officials against the adjacent property called for the difference between the total cost and \$7,994.00. The tax bill sued upon herein is, therefore, not only in violation of the express provision of said Ordinance No. 23,137, but is illegal and void under Section 27 of Article VI of the Charter. Hence the action of this court in upholding such void tax bills is in effect to deprive the appellants of their property without due process of law, in violation of Article XIV, Section 1 thereof of the Amendments to the Constitution of the United States, and in violation of Article II, Section 20, thereof of the Constitution of Missouri, and in violation of Article II, Section 30 thereof of the Constitution of Missouri.

II.

We respectfully submit that the court in its decision entirely overlooked the following questions duly submitted by appellants on pages 39-44 of their brief, relating to the necessity of a true Estimate of the cost of the work and of the city's share of the work being made by the Board of Public Improvements.

Section 15 of Article VI of the Charter of the City of St. Louis expressly provides that all Ordinances recommended by the said Board shall be endorsed with the Estimate of the cost thereof.

Section 27 of Article VI of the Charter provides that the Board of Public Improvements shall prepare and submit to the Municipal Assembly an Ordinance with an Estimate of the cost endorsed thereon by the President of the Board.

Section 28 of Article VI of the Charter provides that every Ordinance requiring work to be done shall contain a specific appropriation of the proper revenue and fund and such part thereof as may be payable by the city, based upon an Estimate of the cost to be
130 endorsed by the President of the Board of Public Improvements on said Ordinance for the whole cost of the proposed work.

The fact that in three separate sections of the Charter it is provided that an Estimate of the cost of the work must be endorsed on the Ordinance prepared by the Board of Public Improvements and submitted to the Municipal Assembly indicates how insistent the framers of the Charter were that there should be an Estimate by the Board of Public Improvements of the cost of the improvement.

We respectfully submit that an estimate of \$17,168.00 is no proper estimate of the City's share when the city is required to pay only \$7,994.00. The framers of the Charter evidently regarded that the making of this estimate was not a mere idle formality, but was of essential importance in order to protect the property owners from ignorance and lack of expert knowledge on the part of the members of the Municipal Assembly and from the cupidity of contractors and also to give notice to property owners of the probable cost and expense to which they would be put by the improvement.

Pursuant to above requirements, the Board of Public Improvements did make an endorsement on the Ordinance in question, by which they estimated the cost to be borne by the city at \$17,168.00 and the cost to be borne by the property owners at merely the difference between \$40,992.00 and said sum of \$17,168.00. The property owners had a right to protest before the Committees of the House and Council against any improvement, and undoubtedly would have protested if there had been endorsed on the Ordinance in question an estimate that the property owners were to pay the difference between \$40,992.00 and \$7,994.00. They were deprived, however, of this opportunity. And the first intimation the
131 property owners had that the tax bill to be levied against the property was to be about \$10,000.00 in excess of the estimate was when the tax bill was issued by the city officials for the larger amount.

We respectfully submit, therefore, that there was no Estimate within the meaning of the Charter and that the tax bill issued in this case is therefore void. And for this court to enforce such tax bill would be in effect to deprive appellants of their property without due process of law in violation of Article XIV, Section 1, thereof, of the Amendments to the Constitution of the United States and in violation of Article II, Sections 20 and 30 thereof of the Constitution of Missouri.

III.

Counsel respectfully submit that the decision is in conflict with that part of Section 14, Article VI of the Charter of the City of St. Louis which defines the meaning of the word "lot." Said definition contained in said Section 14 is two-fold. First, it provides that if a parcel of land is platted as a lot, and the plat duly recorded, such parcel of land shall be regarded as a "lot." In the second place, the said section provides that even if there be no such plat duly recorded, yet if the parcel of land has been treated by the City as a lot it shall be regarded as a "lot."

This Court has held that a parcel of land shall be regarded as a "lot" within the meaning of said section 14, only in case a plat

thereof approved by the Board of Public Improvements is recorded. In so holding the Court overlooked the fact that said Section 14 further provides that if there be no duly recorded plat, a parcel of land is still to be regarded as a "lot," if it has been treated as such

by the city. Said provision is as follows:

132 "If there be no such recorded plat, or if the owners have disregarded the lines of lots as platted and have treated two or more lots or sections thereof as one lot, then the whole parcel of ground or tracts treated as one shall be regarded as a lot for the purpose hereof."

In this case the undisputed evidence shows that lots "H" and "I" of Gimblin's subdivision were by the City of St. Louis for sixty years treated as "lots."

a. The undisputed testimony shows that the plat of the subdivision of H. Gimblin's estate was recorded in the County of St. Louis on May 15, 1855, and said plat contains said lots "H" and "I" as such. Said land did not become a part of the City of St. Louis until the extension of the limits of St. Louis in 1877. The City of St. Louis acquired that territory with its records and plats as it was then in existence. The provision of the City Charter that all plats of subdivisions must be approved by the Board of Public Improvements was enacted subsequently to the acquisition of said territory.

b. The City of St. Louis acquired said land in 1891 by a deed which described same as lots "H" and "I." (Appellants' abstract, page 57.)

c. The City of St. Louis never contemplated a further subdivision of said lots "H" and "I," but acquired them for settling basins of the City Water Works, which precluded the idea of subdivision. The entrance to the property is on Broadway and there is no other entrance to the property.

d. The Board of Public Improvements by its preliminary plat described the said parcels of land as lots "H" and "I."

e. The plats prepared by the City of St. Louis for the purpose of making out the tax bills at the completion of the work referred to said property as lots "H" and "I."

133 The failure of the trial court and of this court to recognize said lots "H" and "I" as "lots" is material in this case as it results in increasing the amount of the tax bill assessed against appellants by nearly 50 per cent.

The tax bills issued in utter disregard of said Charter provision are void. And for this court to enforce such tax bills, void for the reason aforesaid, would be in effect to deprive the appellants of their property without due process of law, in violation of Article XIV, Section 1 thereof of the Amendments to the Constitution of the United States, and in violation of Sections 20-30 of Article II of the Constitution of Missouri.

IV.

Section 25 of Article VI of the Charter of the City of St. Louis, provides that notice shall be given before suit. After requiring such notice said section provides that "in case the owner of the ground is

a non-resident of the state suit can be brought by attachment, which shall be equivalent of notice and a demand for payment." Thereby it is inferentially declared that in other cases, where ordinary suit is brought, the giving of notice shall be a pre-requisite. In this case the undisputed testimony shows that no notice was given appellants of the amended tax bills. This court in holding that the purpose of the notice required by Section 25, Article VI, is merely to inform the person named in the tax bill of the issuance thereof so that he may pay the same without interest at any time within thirty days overlooked the fact that said Section 25 of Article VI, in fact prescribed the giving of notice as a pre-requisite to the attaching of a lien and to the bringing of a suit.

On account of the said failure to give such notice to appellants of the amended tax bill, and the said failure to give appellant, Emily Gast, notice of either the original or the amended tax bill, the said tax bill was invalid and void and the action of this court in upholding and enforcing the same is in effect to deprive appellants of their property without due process of law, in violation of the 14th Amendment, Section 1 thereof of the Amendments to the Constitution of the United States, in violation of Article II, Section 20 thereof, if the Constitution of Missouri, and in violation of Article II, Section 30 thereof, of the Constitution of Missouri.

Respectfully submitted,

JOHNSON, RUTLEDGE & LASHLY,

Attorneys for Appellants.

In the Supreme Court of Missouri, Division No. 2.

And thereafter, to-wit, on May 26th, 1914, the following further proceedings were had and entered of record in said cause:

"SCHNEIDER GRANITE COMPANY, Respondent,
vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Appellants.

Now at this day, the Court having seen and fully understood the appellants' motion for rehearing, heretofore filed herein, doth order that said motion be and the same is hereby overruled."

And thereafter, to-wit, on June 3rd, 1914, the following further proceedings were had and entered of record in said cause:

"SCHNEIDER GRANITE COMPANY, Respondent,
vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Appellants.

Come now the said appellants, by attorney, and file herein their motion to withdraw this cause to the Court in Banc."

Which said motion to transfer to Banc, is in words and figures as follows:

136 In the Supreme Court of Missouri, Division No. 2.

No. 16439.

SCHNEIDER GRANITE COMPANY, a Corporation, Respondent,
v.
GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Appellants.

Appellants' Motion to Transfer to Court en Banc.

Now come the appellants in the above entitled cause and move the court to transfer this cause to the court en banc for its decision. And for the grounds of this motion assign:

I.

That there are several Federal questions in this case involving the construction of the Constitution of the United States. The Charter provisions as construed by the decision work an inequality in all cases where the street improvement abuts upon an unsubdivided tract of land and amounts to a denial of the equal protection of the laws and to a violation of the due process clause of the Federal Constitution.

137 The first of these questions is raised by the answer of appellants and is thus stated in the opinion handed down by Division No. 2:

"It is contended that that portion of the Western boundary of the benefit district affecting the property involved in the present tax bill, was erroneously fixed one-half way between Broadway and Church Road, and, further, that if the Charter of St. Louis (Sec. 14 of Art. VI) be construed to authorize the fixing of the boundary line in such manner, then such charter provision is in conflict with the Fourteenth Amendment of the Constitution of the United States and of Sections 20 and 30 of Article II of the Constitution of Missouri."

This Federal question was decided against the appellants in the opinion written by Commissioner Williams and adopted by Division No. 2, on the authority of *Gilsonite Co. v. St. Louis Fair Association*, 231 Mo. 589; *Granite Bit. Paving Co. v. Fleming*, 251 Mo. 210, and *Fruin-Bambrick Constr. Co. v. St. Louis Shovel Co.*, 211 Mo. 524.

The same question which is involved in this case and in the *Fair Grounds* case, was also involved in the case of *Loth v. City of St. Louis*, recently decided by Division No. 1 of this court and reported in 165 S. W. Rep. 1023, wherein Judge Woodson, in an opinion concurred in by Judge Graves, in discussing the proposition that the same provisions of the charter of the City of St. Louis involved in this case, constitute a denial of equal protection of the law con-

trary to the Fourteenth Amendment to the Constitution of the United States, said:

"These propositions were fully presented by same counsel here in the case of *Gilsonite Co. v. St. Louis Fair Association*, 231 Mo. 589, and were by a majority of the members of this court decided against the position there and here taken by counsel for appellant. While

I do not contend that there is any rule by which exact justice
138 and equality of taxation can be measured out to each and all, in the assessment of special or general taxes, yet I am firmly of the opinion that no court should lend its assent to the great inequality, unjust and oppressive results that are characterized by the ruling of this court in the cases of *Gilsonite Co. v. St. Louis Fair Assn.* *supra*, *Corrigan v. Kansas City*, 211 Mo. 608, and in the case at bar."

In the statement of facts in the *Loth* case, the court seemed to approve the fact that appellants in that case intended to make it "a test case for the highest of all courts (on earth, in my opinion) that of the Supreme Court of the United States, to finally pass upon."

II.

The validity of certain further provisions of the charter of the City of St. Louis is drawn in question in this cause on the ground that said provisions are repugnant to the Constitution of the United States and to the Constitution of the State of Missouri, and that decision of this court is in favor of their validity.

There is a conflict between the construction upon the provisions of Section 15 of Article VI of the Charter of the City of St. Louis and Section 27 of Article VI of said Charter, and the ordinance No. 23,137 in the decision in this case, with the said provisions themselves and with the first section of Fourteenth Amendment of the Constitution of the United States.

These charter provisions make it essential to the validity of any tax, that the ordinance fixing the tax for the improvement, shall specify the funds out of which the improvement shall be paid, which ordinance 23,137 fails to do. The court in its decision by the construction it places upon these provisions, while apparently in approval, does ignore what they really enact with the result
139 that the appellants are deprived of their property without due process of law. Said construction of said charter provision is, therefore, repugnant to the Constitution of the United States. And the decision of this court in favor of the validity of the ordinance giving a construction to the charter provisions at variance with their real meaning, results in depriving the appellants of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and of Sections 20 and 30 of Article II of the Constitution of Missouri.

III.

A further Federal question is involved in the fact that the decision of this court construing Sections 15, 27 and 28 of Article VI of the

Charter in favor of the validity of the tax bill and of City Ordinance 23,137, is in conflict with what said charter provision in fact requires, to-wit, with those sections of the Charter requiring that an estimate of the cost of the entire work, as well as of the city's share of the work, be endorsed on the ordinance. While the opinion of Division No. 2 is in favor of the validity of these sections, the construction placed upon them by Division No. 2 results in depriving the appellants of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and in violation of Sections 20 and 30 of Article II of the Constitution of Missouri.

IV.

A fourth Federal question is involved in this case by reason of the fact that the decision of this court which is in favor of the validity of said tax bill and the ordinance upon which it is based does, by its construction of Section 14 of Article VI of the Charter of the
140 City of St. Louis, deprive appellants of the equal protection of the law and deprive them of their property without due process of law. The decision of this court in its construction of said Charter provisions and said ordinance is in direct conflict with the true intent of said Charter provisions defining the meaning of a "lot." The ordinance approved by the decision fails to include in the benefit district the entire depth of certain lots fronting on the improvement so that the burden of taxation falls unequally upon the property. The appellants are thereby deprived of their property without due process of law and are deprived of the equal protection of the law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and in violation of Sections 20 and 30 of Article II of the Constitution of the State of Missouri. Further that the construction placed by this court upon said provisions results in the same deprivation.

V.

A fifth Federal question is involved in this case by reason of the fact that while the decision of this court is in favor of said tax bill and of the ordinance on which it is based, and while the construction placed upon Section 25 of Article VI of the Charter of the City of St. Louis is in favor of the validity of said section, the decision is in conflict with the true meaning of the Charter and with the provisions of the Fourteenth Amendment of the Constitution of the United States. Appellants are charged with interest from February 8, 1909, the date of the original bill, instead of February 21, 1910, the date of the filing of this suit. Appellant Emily Gast had no notice of either the original or the amended tax bill, yet she is, with the other appellant, charged with interest on said tax bill from February 9, 1909, when the tax bill was originally issued in the name, only,
of the Gast Realty & Investment Company, although an absolutely necessary amendment was made to the tax bill on
141 December 17, 1909, which was essential to the validity of the

tax bill, and at which time the name of the appellant Emily Gast was added as an owner in the tax bill. No new demand was made after the amendment, and interest is allowed from February 8, 1909, instead of from February 21, 1910, with the result that these appellants are by the construction placed upon said provisions of the Charter, deprived of their property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and in violation of Sections 20 and 30 of Article II of the Constitution of the State of Missouri.

VI.

Decision in Conflict with Prior Ruling of This Court.

Appellants further ask that this cause be transferred to the court en banc for decision as the opinion in this case is in conflict with the decision of this court in *Barber Asphalt Pav. Co. v. Peck*, 186 Mo. 506.

In the case at bar the court holds that the plaintiff is entitled to interest on the tax bill from February 8, 1909, the date of its issuance, although on December 17, 1909, the plaintiff made certain amendments to the tax bill which were necessary to the validity of the bill and prerequisite to a recovery on the bill, and in addition joined the appellant Emily Gast as a party to the bill, adding her name as one of the owners. No new demand was made and suit was not filed until February 21, 1910, although this court allows interest at eight per cent. from February 8, 1909.

The facts here seem parallel to those in the *Peck* case (186 Mo. 506). There, after the issuance of the tax bill, it was amended in certain substantial particulars, and the court held that the original demand was not sufficient to start the running of interest. 142 and as no subsequent demand was made after the amendment, the court held that interest ran from the date of the filing of the suit. The court, speaking through Judge Gantt, said, at page 520:

"No demand was made upon the other defendants who are alleged to have been the owners of the lots at that time and at the commencement of the suit. In order to charge them with the penalty of fifteen per cent., we think a demand on them, the owners, was essential. While it was competent to amend the tax bill, this amendment did not relate to the demand on Stephen Peck as executor so as to place them in default at the time when no tax bill existed against them. The doctrine of relation is a salutary one, but is never allowed to operate to the disadvantage of innocent third parties; certainly it ought not to be invoked for the purpose of mulcting one of a penalty. After the tax bill was amended August 2, 1900, no demand was made until suit brought. The bringing of the suit was a demand in and of itself and from that date the penalty started. But the allowance of a penalty prior to that time was error. * * * It was error to allow the penalty of fifteen per cent. prior to the commencement of the suit as no previous demand had been made on the owners."

While it is true we did not call the attention of this court to the Peck case in our motion for rehearing, still we believe this court will be desirous of maintaining a uniformity and harmony in its decisions.

How could there be a penalty on a tax bill that could not be paid? How could a penalty in the shape of interest be charged on an invalid tax bill that could not be the basis of a suit? Why should we

be charged with a year's interest, amounting to \$902.50, 143 when there was no valid bill issued? The demand made for

the payment of an invalid bill was no demand, and there was none until suit was filed. As was said in the Peck case, the allowance of a penalty before that time was error.

VII.

This is a case which should be passed upon by the court en banc because it is the purpose of these appellants to sue out a Writ of Error from the Supreme Court of the United States in this cause, if they are unsuccessful in the highest Court of this State. The Federal statutes which regulate the issue of that writ, authorize its issuance only to the highest Court in this State in which a decision can be had. As this cause admittedly involves a Federal question and the Constitution of this State provides that when a Federal question is involved, the cause shall, upon application by the losing party, be transferred to the court en banc, for its decision, we feel that it is incumbent upon us to make this motion for the transfer of this cause to the court en banc. In this connection we may state that the Supreme Court of the United States has, in *Great Western Tel. Co. v. Burnham*, 162 U. S. loc. cit. 342, 343, held that a writ of error to an inferior court of the State is not authorized even when the highest court of the State has in the same cause determined the Federal question and remanded the cause for further proceedings in accordance with its opinion; and this, even though it is the settled practice of the highest court not to review the question again on subsequent appeal.

Wherefore appellants respectfully submit that this motion to transfer to the court en banc should be sustained.

JOHNSON, RUTLEDGE & LASHLY,

Attorneys for Appellants.

In the Supreme Court of Missouri, Division No. 2.

And thereafter, to-wit, on June 23rd, 1914, the following further proceedings were had and entered of record in said cause:

"SCHNEIDER GRANITE COMPANY, Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Appellants.

Now at this day the court having considered and fully understood the appellant's motion, to transfer this cause to Court in Banc, heretofore filed herein, doth order that said motion be and the same is hereby overruled."

In the Supreme Court of the United States.

16439.

GAST REALTY & INVESTMENT COMPANY, a Corporation, and EMILY
GAST, Plaintiffs in Error,

vs.

THE SCHNEIDER GRANITE COMPANY, a Corporation, Defendant in
Error.

Præcipe.

To the Clerk of the Supreme Court of Missouri:

You are hereby requested and directed to take a transcript of record to be filed in the Supreme Court of the United States pursuant to a writ of error allowed in the above entitled cause, being cause No. 16439 in the Supreme Court of Missouri, and to incorporate (by original or by copy as may be proper) into the transcript of record the following papers and exhibits, to-wit:

1. The writ of error with petition therefor and order of Honorable Henry Lamm, Chief Justice of the Supreme Court of the State of Missouri, allowing said writ of error, supersedeas, and bond and assignment of errors appertaining thereto and citation, and service of same.

2. The transcript of the judgment of the Circuit Court of the City of St. Louis, Missouri, being cause No. 65020 in said Circuit Court, and order allowing appeal to the Supreme Court of the State of Missouri, being transcript originally filed in your office in said cause.

3. Abstract of the record filed by the appellants, now plaintiffs in error, in the above entitled cause with exhibits filed therewith.

4. Respondent's corrections of and additions to appellants' abstract of the record with exhibits filed therewith.

5. Three original plats filed in the Supreme Court of Missouri,

marked Defendant's Exhibit "A," Defendant's Exhibit "B" and Plaintiff's Exhibit "D."

6. Opinion of the Supreme Court of the State of Missouri in said cause.

7. Judgment of the Supreme Court of the State of Missouri in said cause.

8. Motion filed by appellants, now plaintiffs in error, in the above entitled cause for a rehearing of said cause.

9. Order of the Supreme Court of the State of Missouri overruling said motion for a rehearing.

10. Motion filed by appellants, now plaintiffs in error, in the above entitled cause for the transfer of said cause to Court in banc.

11. Order of the Supreme Court of the State of Missouri dated June 23, 1914, overruling said motion for transfer to Court in banc.

12. Præcipe for transcript and service of same.

13. Certificate.

And file said transcript with the Clerk of the Supreme Court of the United States.

JOHNSON, RUTLEDGE & LASHLY,
THOMAS G. RUTLEDGE,
R. A. HOLLAND, JR.,
J. M. LASHLY,

Attorneys for said Plaintiffs in Error.

Due service of the above and foregoing præcipe is hereby acknowledged and accepted this 30th day of June 1914 for and on behalf of the aforesaid Schneider Granite Company, defendant in error in the above entitled cause.

HICKMAN P. RODGERS,
*Attorney for Schneider Granite
Company, Defendant in Error.*

[Endorsed:] Filed Jul- 1, 1914. J. D. Allen, Clerk.

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Return to Writ.

STATE OF MISSOURI, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, together with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Missouri, at Jefferson City, Mo., this 1st day of July, A. D. 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk.*

In the Supreme Court of Missouri.

STATE OF MISSOURI, *set*:

I, J. D. Allen, Clerk of the Supreme Court of Missouri, certify that the above and foregoing is a full, true and correct transcript of the record and proceedings in this Court, in case No. 16,439, entitled Schneider Granite Company, Respondent, (Defendant in Error) v. Gast Realty & Investment Company, and Emily Gast, Appellants (Plaintiffs in Error), as called for in the præcipe filed by the Plaintiffs in Error herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said Supreme Court. Done at my office in the City of Jefferson, State of Missouri, this 1st day of July, A. D., 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,

Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 24,322. Missouri Supreme Court. Term No. 211. Gast Realty and Investment Company and Emily Gast, plaintiffs in error, vs. Schneider Granite Company. Filed July 24, 1914. File No. 24,322.

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OFFICE SECRETARY OF THE COURT
F. L. N. 22
MAY 8 1915
JAMES B. WAHER
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1914.

No. 578 211

GAST REALTY & INVESTMENT COMPANY,
a Corporation, and EMILY GAST,
Plaintiffs in Error,

VS.

SCHNEIDER GRANITE COMPANY, a Corporation,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

SUGGESTIONS AND BRIEF IN OPPOSITION
TO MOTION TO DISMISS.

ROBERT A. HOLLAND, JR.,
THOMAS G. RUTLEDGE,
J. M. LASHLY,

All of St. Louis, Missouri,
Attorneys for Plaintiffs in Error.

[24,322]

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

No. 578

GAST REALTY & INVESTMENT COMPANY,
a Corporation, and EMILY GAST,
Plaintiffs in Error,

vs.

SCHNEIDER GRANITE COMPANY, a Corporation,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

[24,322]

**SUGGESTIONS AND BRIEF IN OPPOSITION TO
MOTION OF DEFENDANT IN ERROR TO
DISMISS WRIT OF ERROR.**

I.

Motion Papers Deficient.

The motion papers prepared by the defendant in error in this cause fail to set forth all of the neces-

sary facts, and, therefore, appear to be deficient under the decisions of this Court in

City of Waterville vs. Van Slyke, 115 U. S. 290;
Callan vs. Bransford, 139 U. S. 210.

These papers should have contained what the Supreme Court of the State of Missouri has said, on the Constitutional point involved, in its opinion in this cause. To supply that omission we quote the following from that opinion:

“It is contended that that portion of the western boundary of the benefit district affecting the property involved in the present tax bill was erroneously fixed one-half way between Broadway and Church Road, and further that if the Charter of St. Louis be construed to authorize the fixing of the boundary line in such manner, then said Charter provision is in conflict with the Fourteenth Amendment to the Constitution of the United States and with Sections 20 and 30 of Article II of the Constitution of Missouri. * * *

“The point here raised has been fully discussed and directly passed upon by this Court in a number of decisions. No present reason appears why the subject should again be discussed at length, but, for the purpose of the present case, it is sufficient to say that the rule has become firmly established by former opinions of this Court to the effect that the Charter of St. Louis does provide for the fixing of the boundary line of the benefit district as the same was fixed at the place above mentioned in the case at bar, and that such Charter provision does not conflict with any of the above mentioned Constitutional provisions.” (The Court here cites, among other cases, Gilsonite Co. vs. St. Louis Fair Ass’n, 231 Mo. 589.)

II.

Federal question clearly and properly raised so as to give this court jurisdiction, and make dismissal on motion impossible.

It appears from the parts of the answer in this cause which are set forth on pages 5 and 6 of the printed motion papers, and from that part of the motion for new trial set out on page 7 thereof, that the contention was indisputably advanced that the assessment in litigation contravenes the provisions of the Fourteenth Amendment of the Federal Constitution, in that the assessment constituted a taking of property without due process of law and, further, in that the statutory provisions, under which the assessment was made, deny to the plaintiffs in error the equal protection of the law.

It further appears from the quotation hereinbefore made from the opinion of the Supreme Court of the State of Missouri in this cause, that that question was considered and determined adversely to the plaintiff in error by that Court. There is, therefore, clearly no ground for the motion to dismiss the writ of error; and this is so, whether the question raised is with or without merit.

Bohannon vs. Nebraska, 119 U. S. 231;

Blyth vs. Hinekey, 180 U. S. 333.

III.

The Federal question involved is not frivolous and is debatable, and judgment cannot be affirmed on motion.

In order that a judgment of a State court, to which a writ of error is sued out from this Court, should be affirmed on motion, the Federal question raised in the case must be clearly frivolous and not debatable; and this is the ground of the present motion. Were this not so, the oral argument, for which the rules and practice of this Court provide, would be dispensed with in cases in which parties are entitled thereto.

That the Federal question involved in this case is not of this character can be readily demonstrated; and that, too, without mention of the particulars of the assessment in controversy.

It appears from our foregoing quotation from the opinion of the Supreme Court of Missouri in the case at bar that that Court cited the case of **Gilsonite Co. vs. St. Louis Fair Ass'n**, 231 Mo. 589, in support of its ruling upholding the constitutionality of the provisions of the Charter of the City of St. Louis, under which the tax bill sued upon in this cause was issued. An examination of the report of that decision will show that Woodson, J., dissented from the majority opinion in the case, saying:

“Woodson, J.—I dissent from the majority opinion in this cause for the reason that in my judgment the Charter provision in question only applies to tracts of land which are platted and laid out in lots and blocks, streets, avenues and alleys.

“I am also of the opinion that if said Charter provision was intended to apply to unplatted ground, then in my judgment it would be violative of both the State and Federal Constitutions.

“Graves, J., concurs with the foregoing views.”

The **Gilsonite** case here quoted from was followed by **Loth vs. St. Louis**, 257 Mo. 399, in which the very same question, decided in the **Gilsonite** case and involved in the case at bar, was again considered. In the **Loth** case the opinion was rendered by Woodson, J., and concurred in by Graves, J. We quote the following therefrom:

“While I do not contend that there is any rule by which exact justice and equality of taxation can be measured out to each and all in the assessment of special or general taxes, yet I am firmly of the opinion that no court should lend its assent to the great inequality, unjust and oppressive results that are characterized by the ruling of this court in the cases of **Gilsonite Co. vs. St. Louis Fair Association**, *supra*; and in the case at bar.”

The case of **Loth vs. St. Louis** is now pending in this court on writ of error; indeed, the case was brought with a view of obtaining a determination by this court of the constitutionality of the provisions of the St. Louis Charter for assessments for street improvements; and the judges of the Supreme Court of Missouri were apprised of that fact when they decided the case. This appears from the following excerpt from the opinion of the Supreme Court of Missouri in the case:

“The facts of the case are practically undisputed; consequently only questions of law are here presented for determination; and judging from the record that this is a test case for the **Greatest of All Courts** (on earth, in my opinion), that of the Supreme Court of the United States, to finally pass upon, I will accept substantially the statement of the case made by counsel for appellants.”

We trust that the foregoing quotations of the views of two of the judges of the Supreme Court of Missouri upon the very question involved in this case, and in the case of **Loth vs. City of St. Louis**, now also before this court, are sufficient to show that, whatever may be the true solution of that question, it certainly cannot be said that the contention embodied in it is frivolous and not debatable.

IV.

Discussion of Facts Involved.

We have so far considered it unnecessary to refer to the particular features of the constitutional question raised in this cause. We desire now to add a few remarks in relation thereto, and the governing law, though we realize that, if the position already taken by us is sound, this is unnecessary.

We have concluded to do this to prevent misconceptions from the remarks made in the motion papers filed on behalf of the defendant in error.

The Charter of the City of St. Louis, under which the tax bill sued upon was issued, provides that one-quarter of the cost of a street improvement shall be assessed upon the property fronting upon the improvement in proportion to the frontage, that is, per front foot, and that the remaining three-fourths of that cost shall be assessed, according to area, upon all the property embraced in an assessment district, which shall be established by drawing, on either side of the street improved, a line midway between that street and the

next parallel or converging street. But, in making this rule for assessment according to area, the Charter further provides, by way of exception to the general rule, that, when there is a parallel or converging street on one side of the street improved, but not on the other, the property on the former side shall be assessed to the average depth to which the property on the latter side is assessed, and that, when there is no parallel or converging street on either side of the street improved, the property on both sides shall be assessed to the depth of three hundred feet.

Now, in the case of **Gilsonite Co. vs. St. Louis Fair Ass'n**, 231 Mo. 589, the position was taken by the landowners that the above mentioned provision for assessment to the midway line was not applicable to assessments against unsubdivided and unplatted tracts, but that these came within the above mentioned exceptions to the midway rule; and the landowners further contended that, if this construction should not be adopted, the Charter would be in conflict with the Fourteenth Amendment of the Constitution of the United States, as effecting a deprivation of property without due process of law, and denying the equal protection of the law.

The majority of the Supreme Court of Missouri held against both of these contentions, and virtually ruled that the assessment to the midway line obtained under the Charter, regardless of the distance between the street improved and the next parallel or converging street. Indeed, for the purpose of illustrating the effects of the construction established by the Supreme Court of Missouri, we may refer to the following facts mentioned in the opinion of the court itself:

The property involved in the **Gilsonite case** had a front of 1,474.88 feet upon the street improved; the total frontage of the improvement was 4,087.73 feet. The total cost of the improvement was \$23,278.62; the assessment against the property involved was \$16,974.51. It must also be borne in mind that the amount of this cost of the improvement, and also the amount of the assessment, included the 25 per cent. which were assessable according to frontage and against which no legal objection is made; so that the disproportion of the area assessment is greater than above indicated. This disproportion resulted from the fact that the property involved was assessed to a depth of 1,947.5 feet, while the property adjacent on the same side of the street was assessed to a depth of only 202 feet, and the property fronting on the opposite side of the improvement was assessed to a depth varying from 120 feet to 320 feet. The difference in these various depths was due to the fact that the property involved in the case was a large unsubdivided tract, and the distance between the street on the one side of it and the street on the other was 3,895.83 feet, while the adjacent and opposite property is subdivided into blocks and lots.

We may add that the features thus presented by the **Gilsonite case** are not at all exceptional features. They exist, to greater or less extent, in every case in which there is an unplatted tract on the street improved, and there are subdivided tracts adjacent or opposite thereto; and there are very many of these, since the majority of the streets in the western half of the City of St. Louis present situations of this kind. These features are set forth in the **Loth case**, and the opinion of the Supreme Court in that case, as shown by the fore-

going extract therefrom, states that "the facts of the case are practically undisputed."

We may add, by way of illustration, that, in one of these assessments, which may hereafter come before this court, the area assessment on the one side of the street improved went to a depth of four thousand, one hundred and sixty-five feet, while the land on the opposite side of the improvement was triangular in shape, and was assessed at its longest side to a depth of only one hundred and fifty feet.

In the case at bar, the disproportion between the depth of the assessment against the property directly involved, and the assessment against adjacent property, is not as pronounced as in the **Gilsonite** case; yet, even in it, the property proceeded against was assessed to a depth of approximately thrice the depth to which adjacent lands were assessed. But the disposition of the question involved in this case does not, in our judgment, depend upon the particular features of each case; if the rule of assessment is invalid as a general rule, it is invalid in all cases affected by it. In **White vs. Gove**, 183 Mass., l. c. 338, the Court says:

"In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the Constitution in its application to cases which may be expected to arise."

We do not contend that a law for assessments for local improvements is unconstitutional, because the apportionment under it of the cost of the improvement is, in isolated cases, productive of inequality; for exact

equality is not attainable. But we do maintain that the power of the Legislature in the assessment of local benefits is not absolute, that a valid law must be productive of some fair general rule of apportionment, and that, when the law arbitrarily creates gross inequalities, which are known at the time of its enactment and are readily avoidable, it contravenes the provisions of the Federal Constitution.

The governing rule, for which we contend, is thus expressed through Cooley, J., in **People vs. Salem**, 20 Mich., l. c. 474:

“The tax must be laid according to some rule of apportionment, not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. * * * Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable.”

This rule was quoted with approval in **Hyattsville vs. Smith**, 105 Md., l. c. 322, and is supported by:

City of Independence vs. Gates, 110 Mo., l. c. 382;
Fulkerson vs. Bristol, 105 Va., l. c. 561;
Preston vs. Roberts, 12 Bush, l. c. 585;
State vs. District Court, 33 Minn., l. c. 245;
Allen v. Drew, 44 Vt. 174.

The rulings of this Court are in consonance with the foregoing views. This Court has recognized in **Ballard vs. Hunter**, 204 U. S., l. c. 255, 256; **Seattle vs. Kelleher**, 195 U. S., l. c. 358, 359, and other cases, that an assess-

ment for a local improvement may contravene the Fourteenth Amendment of the Federal Constitution, when arbitrarily made.

In **Railroad vs. Barber Asphalt Co.**, 197 U. S. 430, upon which the defendant in error relies in its motion papers, this Court upheld the assessment only "as embodying a principle generally fair and doing as nearly equal justice as can be expected." And when that case was subsequently referred to in **Martin vs. District of Columbia**, 205 U. S., l. c. 139, the following comment was made by this Court with reference to it:

"But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent."

And the governing rule has been thus laid down in **Cotting vs. Godard**, 183 U. S., l. c. 110, 111, 112:

"Tax laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. But that inequality is something which it is impossible to foresee and guard against, and therefore such resultant inequality in the operation of law does not defeat its validity. . . ."

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed."

The same is clearly true with respect to the con-

stitutional guaranty against the taking of property without due process of law.

To what we have said we may add that the rulings of this Court, which are referred to in the motion papers of the defendant in error as having arisen under the Charter of the City of St. Louis, arose not under the Charter provisions which are involved in the case at bar, but under former Charter provisions which are no longer in force. They relate to what is commonly known as the front foot rule, and assessments for a sewer over a district specially established for it, and therefore established with reference to the benefits resulting from the sewer; and they can have no bearing upon the question, whether an entirely different method of assessment is so arbitrary and unfair as to be repugnant to constitutional rights.

ROBERT A. HOLLAND, JR.,
THOMAS G. RUTLEDGE,
J. M. LASHLY,

All of St. Louis, Missouri,
Attorneys for Plaintiffs in Error.

Copy of the foregoing brief and suggestions in opposition to motion of defendant in error to dismiss writ of error received this 4th day of May, 1915.

(Signed) HICKMAN P. RODGERS,
Attorney for Defendant in Error.

FILED

APR 22 1915

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 578 211

**GAST REALTY & INVESTMENT COMPANY AND
EMILY GAST, PLAINTIFFS IN ERROR,**

vs.

SCHNEIDER GRANITE COMPANY.

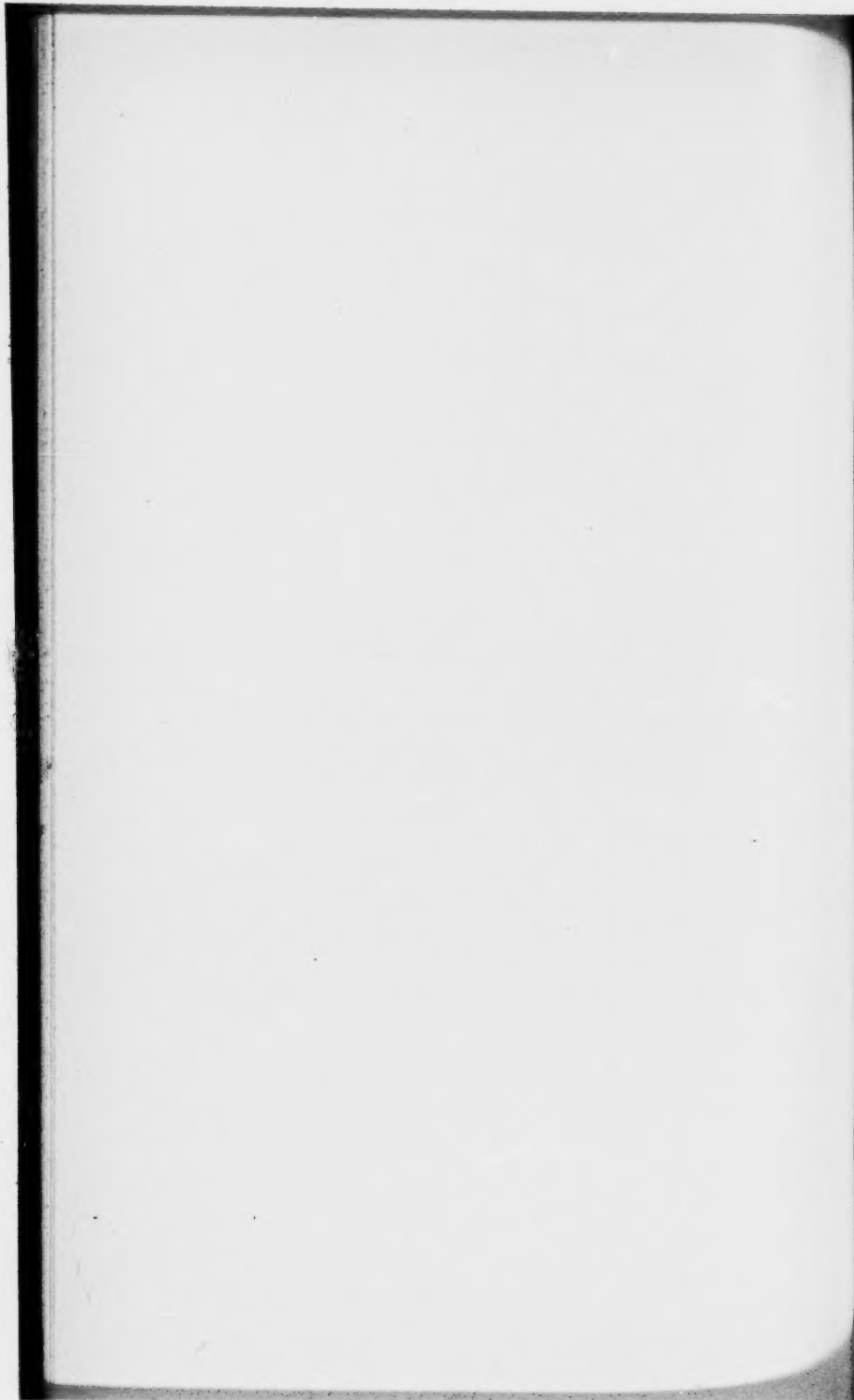
**MOTION TO DISMISS OR AFFIRM OR TRANSFER TO
SUMMARY DOCKET.**

HICKMAN P. RODGERS,
Attorney for Defendant in Error.

(24,322)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 578.

GAST REALTY & INVESTMENT COMPANY AND
EMILY GAST, PLAINTIFFS IN ERROR,

vs.

SCHNEIDER GRANITE COMPANY, DEFENDANT IN
ERROR.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

**MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM
JUDGMENT OR TO TRANSFER TO THE SUMMARY
DOCKET.**

Now comes the defendant in error, Schneider Granite Company, by its attorney of record herein, and moves this honorable court:

First. To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof, no Federal question being involved therein.

Second. To affirm the judgment of the Supreme Court of the State of Missouri on the ground that it is manifest that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depend are so frivolous as to need little or no argument, having been repeatedly decided by this court contrary to the contentions of plaintiffs in error.

Third. To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or to affirm, because the case is of such a character as not to justify extended argument.

HICKMAN P. RODGERS,
Of St. Louis, Missouri,
Attorney of Record for Defendant in Error.

NOTICE OF MOTION.

The plaintiffs in error are hereby notified that the defendant in error will on the 10th day of May, A. D. 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including portions of the record and sections of the charter of the City of St. Louis concerning assessments for street improvements and of the constitution of the State of Missouri in said cause, as contained in an appendix thereto, all of which are now served upon you herewith.

HICKMAN P. RODGERS,
Of St. Louis, Missouri,
Attorney of Record for Defendant in Error.

Copy of foregoing motion and notice, together with statement of facts, points and authorities, argument and appendix, received this 17th day of April, 1915.

ROBERT A. HOLLAND, JR.,
THOMAS G. RUTLEDGE,
J. M. LASHLY,
Of St. Louis, Missouri,
Attorneys of Record for Plaintiffs in Error.

II.

PLEADINGS.

Defendant in error, on February 21, 1910, instituted in the Circuit Court of the City of St. Louis, Missouri, a suit to enforce the lien of a special tax bill against property of plaintiffs in error, and alleged therein in substance as follows:

Plaintiff in said suit (but defendant in error herein), under a contract with the city of St. Louis, improved a public street of said city, called Broadway, by preparing roadbed and paving with granite blocks set in concrete, and on completion of the work was paid in special tax bills, among them being one in the sum of \$14,522.65 against ground of defendants (plaintiffs in error herein), asking judgment for the amount of said bill with interest thereon and costs, and that the property charged be sold to satisfy same, payment of said bill having been refused on demand.

The answer of defendants in said suit sought to raise constitutional questions through averments as follows:

"Defendant states that the said attempted assessment of \$14,522.65 against defendant's property described in plaintiff's amended petition is illegal and invalid and that the said alleged special tax bill issued upon said alleged assessment and evidencing the same is illegal and invalid and vastly in excess of the amount which should be assessed against defendant's property, or any part thereof, for the work done on Broadway as alleged in plaintiff's amended petition: that said amount of said alleged special tax bill has been assessed against a large part of defendant's said property which is not liable to assessment for the work aforesaid, and in this respect defendant says that the action of said Board of Public Improvements in including within the said assessment district all of defendant's property described in plain-

tiff's amended petition is without warrant of law, illegal and void; and that said assessment is contrary to Section 14 of Article VI of the Charter of the City of St. Louis, and is without warrant of law and is void, in this: That by the terms of said Section 14 of Article VI of the Charter of the City of St. Louis it is provided that if there is no parallel or converging street on one side of the street to be improved, then the district line or such side of the street to be improved shall be drawn at the average distance of the opposite district line; and defendant states that Church road is not and was not, within the meaning of the Charter of said City of St. Louis, the nearest parallel or converging street to said Broadway on the west of said Broadway; that on the west side of said Broadway there is not and was not at any of the times mentioned in said amended petition any parallel or converging street to said Broadway within the meaning of said Charter, and that the benefit area district line on the west of Broadway should have been drawn across this defendant's property at a distance west of Broadway equal to the average distance of the opposite district line on the east side of Broadway.

"And defendant states that the property of defendant above described will, in the natural course of events, be cut into city blocks by opening streets running east and west and north and south through said large undivided area; that immediately north of the property of defendant described in the amended petition is an open public street, known as Jordan street, which runs north and south parallel to Broadway, and which, if extended south, would divide the tract of land of defendant herein referred to into blocks, and that eventually, in the future, three public streets will be extended in a north and south direction through defendant's said property and one or more streets in an east and west direction, all of which streets will have to be improved at the expense of defendant's property.

"And this defendant states that if said Section 14 of Article VI of the Charter of the City of St. Louis be so construed as to include within the benefit dis-

trict for the improvement of said Broadway the said property of the defendant described in plaintiff's amended petition, then said Section 14 of Article V of said Charter is illegal and void, in that said section of said Charter, if so construed, would impose grossly unequal, unfair and inequitable burdens upon that part of defendant's above-described property west of a line drawn across this defendant's property at a distance west from Broadway equal to the average distance of the opposite district line from said Broadway on the east side thereof; and, if so construed and enforced, would deprive the defendant of the equal protection of the laws and deprive defendant of its property without due process of law, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States, and contrary to Section 20 of Article II of the Constitution of Missouri, and contrary to Section 30 of Article II of the Constitution of Missouri."

"And further answering this defendant states that the said benefit district so extended and fixed by the City of St. Louis and the President of the Board of Public Improvements was illegal and improper and not in conformity with the provisions of the Charter of the City of St. Louis and the existing law, in this: That Section 14 of Article VI of said Charter provides that, if the property adjoining a street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. And defendant states that lots H and I of the subdivision of Gimblin's estate are lots as shown by recorded plats of additions or subdivisions fronting on Broadway and lying between Gimblin road and Pelham avenue; that in defining, bounding and establishing the said benefit district, the City of St. Louis and the President of the Board of Public Improvements should have drawn the district line on the east side of Broadway so as to include the entire depth of said lots H and I so fronting on Broadway; and defendant states that in failing to include the entire depth of said lots H and I and in establishing the east line of the benefit district on the east side of Broadway at a

distance of only 240.83 feet east of Broadway for a distance of 818.38 feet south of Gimblin road, the said City of St. Louis and the President of the Board of Public Improvements erroneously interpreted the Charter and the law, and that thereby the benefit district as established was made illegal and void and all the tax bills issued on all of the property included in said illegal and erroneously established benefit district, and especially the tax bill issued against defendant's property, were illegal and void."

Judgment having been rendered against them, said defendants, in their motion for new trial, renewed their constitutional contention in the following words:

"The interpretation placed by this court in its finding and judgment upon Section 14 of Article VI of the Charter of the City of St. Louis makes it illegal and void because it deprives defendants of the equal protection of the laws and deprives defendants of their property without due process of law, contrary to Section 1 of Article XIV of the Amendments of the Constitution of the United States, and contrary to Section 20 of Article II of the Constitution of Missouri and contrary to Section 30 of Article II of the Constitution of Missouri."

III.

FACTS.

The western line of the benefit district in question was drawn parallel to Broadway (the street improved) midway between Broadway and Church road (the next parallel street to the west of Broadway), and distant at the furthestmost point about 986 feet from Broadway; and the ground assessed in the present tax bill, lying wholly within the boundaries of the district so drawn, and not having been divided into lots (it was used by its owners as a summer resort and baseball park), was charged in one tax bill—that is, the bill involved in this proceeding, with its proportionate part of the cost of improvement of said street, upon which it had a

front of 1085.71 feet by a depth westwardly of $\frac{327.18}{418.92}$ feet.

Lots H and I, mentioned in that part of the answer hereinabove set forth, derived their designation from a commissioner's plat in a proceeding to partition farm land at a time when it was outside the limits of the city of St. Louis. These lots comprised in the aggregate a number of acres used, at the time of the assessment, as a water-works site by the city.

After deciding the case, Division No. 2 of the Supreme Court of Missouri denied the motion to transfer the cause to the Supreme Court of Missouri in Banc.

IV.

POINTS AND AUTHORITIES.

(a) A Federal question cannot be raised for the first time in the petition for a writ of error from this court and the accompanying assignment of errors.

Haire vs. Rice, 204 U. S., 291, l. c. 301.

(b) This court is concluded by the construction placed by the Supreme Court of Missouri upon the statutes in question.

Schaefer vs. Woerling, 188 U. S., 516 (and cases there cited).

(c) All so-called Federal questions raised by the assignment of errors herein have been determined contrary to the contentions of plaintiffs in error.

French vs. Barber Asphalt Co., 181 U. S., 324.

Shumate vs. Heman, 181 U. S., 402.

Schulte vs. Heman, 189 U. S., 507.

(The last two cases arose under the charter of the city of St. Louis.)

(d) The rulings of this court in the cases cited under our last previous point are *stare decisis*.

L. & N. R. R. Co. vs. Barber Asphalt Co., 197 U. S., 430 (and cases there cited).

V.

ARGUMENT.

It will be noticed that it is in the assignment of errors accompanying the petition for writ of error that the first effort is made to raise a Federal question as to sections 15, 27, and 28, of the charter of the City of St. Louis, and as to the manner in which the municipal authorities drew the boundary line of the benefit district through the city water-works property designated as lots H and I. Under cases we cite, these questions cannot be brought before this court in that manner. However, said last-mentioned sections are set out in the appendix hereto. None of them violates the Federal Constitution.

It will also be noticed that the answer while alleging that the interpretation of section 14 of the charter which resulted in the benefit district established was violative of the Constitution of the United States, in including too much of the ground of plaintiffs in error, said answer fails to allege that the interpretation which they say led to the inclusion of too small a portion of the water-works property, was in violation of the Federal Constitution.

This court will not review the holdings of the Supreme Court of Missouri on the questions of compliance with the statutes as to the drawing of boundaries for the present benefit district. (Reported in 168 S. W. Rep., p. 687.)

In the opinion of Mr. Justice Brewer this court said:

"The construction placed by the supreme court of a State upon its statutes is, in a case of this kind, conclusive upon this court."

(Citing cases wherein this court upheld similar laws for assessment in street improvements.)

Schaefer vs. Werling, 188 U. S., 516, l. c. 518.

The contention of plaintiffs in error herein to the effect that they have been deprived of the equal protection of the law, and that the decision of the State courts of Missouri, including its supreme court, would deprive them of their property without due process of law, is threadbare. All such questions have been uniformly decided by this court contrary to the contentions of plaintiffs in error. The statutory and charter provisions for assessments against private property for proportionate part of cost of street improvements, similar to those involved herein, have many times been upheld by this court.

In the opinion of the court, written by Mr. Justice Holmes, involving a question of assessment for street improvement resembling so closely the present case it cannot be distinguished therefrom, the following language was used:

"It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States."

(Citing many cases.)

L. & N. R. R. Co. *vs.* Barber Asphalt Co., 197
U. S., 430; *l. c.*, 434.

Therefore defendant in error respectfully submits that the present litigation, in which it has heretofore been successful at every stage, has pended for more than five years; that the long delays incident to appellate procedure have already worked great hardships; that the writ of error is taken for delay only and that the contentions upon which it is claimed a Federal question depends are apparently so frivolous as to not require further argument.

HICKMAN P. RODGERS,

Of St. Louis, Missouri,

Attorney of Record for Defendant in Error.

VI.

APPENDIX.

Pursuant to the rules and practices of this honorable court, and for the purposes of these motions only, defendant in error has caused to be printed the assignment of errors to the Supreme Court of the State of Missouri, which accompanied the petition in error filed herein; also the sections of the charter of the City of St. Louis mentioned in the assignment of errors; also sections of the constitution of the State of Missouri in force at the time of trial.

Authorities:

Carey *vs.* Houston, 150 U. S., 179.

Rouch *vs.* Nevin, 128 U. S., 579.

ASSIGNMENT OF ERRORS.

IN THE SUPREME COURT OF THE STATE OF
MISSOURI, DIVISION NUMBER TWO.

No. 16439.

THE SCHNEIDER GRANITE COMPANY, a Corporation,
Plaintiff and Respondent,

vs.

GAST REALTY & INVESTMENT COMPANY and EMILY GAST,
Defendants and Appellants.

Now come the Gast Realty & Investment Company and Emily Gast, the above-named defendants and appellants, and, in connection with the petition for a writ of error herein, make the following assignment of errors which they aver occurred in the judgment of the Supreme Court of the State of Missouri, which said judgment was rendered by the Supreme

Court of Missouri and became final on the 23d day of June, 1914, and as and for said assignment of errors they respectfully aver and say:

1. The Supreme Court of the State of Missouri erred in ordering that the judgment of the Circuit Court of the City of St. Louis should be affirmed.

2. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of section 14 of article VI of the charter of the City of St. Louis are not repugnant to the Constitution of the United States.

3. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of section 14 of article VI of said charter of the City of St. Louis are not repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of said section fourteen do not provide for the taking of property without due process of law, contrary to the provisions of said section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of said section fourteen do not deny to persons within the jurisdiction of the State of Missouri, and also to persons within the jurisdiction of the City of St. Louis, Missouri, and particularly such persons owning land in said City of St. Louis, including said above-named defendants and appellants, the equal protection of the law.

6. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of said section fourteen are valid.

7. The Supreme Court of the State of Missouri erred in holding in said cause that the matters and things done under said section fourteen and complained of in this cause are not repugnant to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

8. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of section 15 of article VI of the charter of the City of St. Louis and section 27 of article VI of said charter, are not repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States, and erred in holding that the provisions of said section do not deprive the defendants and appellants of their property without due process of law, and that they do not deny persons within the jurisdiction of the State of Missouri and also within the jurisdiction of the City of St. Louis, including the above-named defendants and appellants, the equal protection of the law, and the said Supreme Court of the State of Missouri erred in holding that the provisions of said section are valid.

9. The Supreme Court of the State of Missouri erred in holding in said cause that the provisions of sections 15, 27, and 28 of article VI of the charter of the City of St. Louis are not repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States, and erred in holding that the provisions of said section do not provide for the taking of property without due process of law, contrary to the provisions of said Fourteenth Amendment, and do not deny to persons within the jurisdiction of the State of Missouri, particularly to these defendants and appellants, the equal protection of the law, and the court erred in holding that said provisions are valid.

10. The Supreme Court of the State of Missouri erred in holding that the provisions of section 14 of article VI of the

charter of the City of St. Louis are not repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States, and erred in holding that the provisions of said section 14 of article VI do not provide for the taking of property without due process of law, contrary to the provisions of said amendment, and in holding said section does not deny to persons within the jurisdiction of the State of Missouri, including these defendants and appellants, the equal protection of the law, and, further, in holding that the provisions of said section are valid, and erred in holding that the provisions of said section are invalid in so far as they relate to the definition of the word "lot," and its provision as to what constitutes a lot, resulting in depriving the defendants and appellants of their property without due process of law, in violation of sections 20 and 30 of article II of the Constitution of the State of Missouri.

Wherefore the said Gast Realty & Investment Company and Emily Gast pray that said judgment of the Supreme Court of the State of Missouri may be reversed, annulled, and altogether for naught held and that they may be restored to all things which they have lost by reason of said judgment of the Supreme Court of the State of Missouri.

GAST REALTY & INVESTMENT
CO. AND
EMILY GAST,
By JOHNSON, RUTLEDGE & LASHLY,
THOMAS G. RUTLEDGE,
R. A. HOLLAND, JR.,
J. M. LASHLY,
Att'ys for Appellants.

Charter of the City of St. Louis.

Provisions of the charter of the City of St. Louis with reference to special taxes for street improvements and establishment of benefit districts:

ARTICLE VI.

"SEC. 14. Special Taxes to be Levied and Assessed According to Frontage and Area, Apportionment.—Special taxes for the improvements of streets, avenues and public highways shall be levied and assessed as follows: The total cost of grading and preparing the roadbed for the superstructure, placing foundation, curbing, guttering, roadway paving and crosswalks for the street embraced in the improvement, including all intersections of streets and alleys, shall be ascertained, and one-fourth thereof shall be levied and assessed upon all the property fronting upon or adjoining the improvement, in the proportion that the frontage of each lot so fronting or adjoining bears to the total aggregate of frontage of all lots or parcels of ground fronting upon or adjoining the improvement, and the remaining three-fourths of the cost so ascertained shall be levied and assessed as a special tax upon all the property in the district to be defined and bounded as hereinafter provided, in the proportion that the area of each lot or parcel of ground or the part of such parcel of ground lying within the district bears to the total area of the district, exclusive of streets and alleys."

"Benefit Districts for Special Taxation Established. Method.—The districts herein referred to shall be established as follows: A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on

the street to be improved. If the line drawn midway as above described would divide any lot lengthwise or approximately lengthwise, and the average distance from the midway line so drawn to the nearer boundary line of the lot is less than twenty-five feet, the district line shall in such case diverge to and follow the said nearer boundary line. If there is no parallel or converging street on either side of the street to be improved, the district lines shall be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located. *Provided* that if any property in a district established as herein provided is not liable to special assessment, the city shall pay the proportion of cost of the improvement which would have been assessed against such property. All of the property in the lots, blocks or tracts of land lying between the streets to be improved and the district lines established as above specified, shall constitute the district aforesaid."

* * * * *

"Lot" Defined.—The word 'lot' as used in this section, shall be held to mean the lots as shown by recorded plats of additions or sub-divisions."

"Sec. 15. Improvement Ordinance. Requisites—May Specify Term of Years for Which Work Shall be Maintained—Estimate of Cost to be Endorsed—Street, etc., to be Established or Dedicated Prior to Improvement.—

"All ordinances recommended by said Board shall specify the character of the work its extent, the material to be used, the manner and general regulations under which it shall be executed, the fund out of which it shall be paid for, and may specify a term of years for which the work shall be maintained by the contractor, and shall be endorsed with the estimate of the cost thereof; *provided*, that no improvement or repairs shall be ordered upon any future street, alley or highway which shall not have been opened, dedi-

cited or established according to the provisions of this charter and law."

"SEC. 27. Assembly Forbidden to Contract for Public Work—B. P. I. to Submit Ordinance for Proposed Work—Advertising for Bids, Requisites—Contract to be Let to 'Lowest Responsible Bidder'—One Having Failed to Carry Out Prior Contract with City Deemed Not Responsible—Bids May be Rejected—Sureties on Contractor's Bond.—

"The Assembly shall have no power directly to contract for any public work or improvement, or repairs thereof, contemplated by this Charter, nor to fix the price or rate therefor; but in all cases, except in case of emergency work or necessary repairs requiring prompt attention, the Board of Public Improvements shall prepare and submit to the Assembly an ordinance, with an estimate of the cost endorsed thereon by the President of the Board, authorizing the doing of any proposed work, and, under the direction of the ordinance authorizing the same, shall advertise for bids, in the papers doing the city printing, three times, the last publication to be at least ten days before the day appointed for the opening of the bids, stating the general nature of the work to be done and the time and place when the bids will be received, and shall let out said work by contract to the lowest responsible bidder. Any other mode of letting out or contracting for work shall be held as illegal and void. But when so provided in the ordinance authorizing or directing the work to be done, the advertising may be for a different period, and in other papers than those provided above. No security on any bond shall be taken unless he shall pay taxes on property equal in an amount to his liability on all bonds on which he may be security to the city. And no contract shall be made under this section without bond for its faithful performance, with at least two sufficient securities. No person, firm or corporation shall be deemed such a responsible bidder who has failed or refused to fully carry out any prior contract let to him or them for doing any work contemplated by this charter: *Provided, however,* that the said Board of Public Improvements shall have full power and authority to reject all bids so advertised for and submitted, whenever, in its judgment, the interests

of the city may require, and in such event shall, in like manner, readvertise for bids for such work.

"Certified Checks to Accompany all Bids.—All bids for the doing of public work shall be accompanied with a certified check on some bank or trust company in the city of St. Louis, payable to the order of the treasurer of the city of St. Louis, for the amount of the deposit required, enclosed in the sealed envelope enclosing the bid."

"Sec. 28. Improvement Ordinances to Contain Specific Appropriations—Work May be Done in Parts, but Appropriation Shall be Made for Each Part.—Every ordinance requiring work to be done shall contain a specific appropriation from the proper revenue and fund for such part thereof, as may be payable by the city based upon an estimate of cost, to be endorsed by the President of the Board of Public Improvements on said ordinance, for the whole of the cost of the proposed work: *Provided, however*, that when the work contemplated by such ordinance is of such magnitude that the total cost thereof would exceed the amount of money then in the city treasury, and available for such purpose, the ordinance may provide for the whole work, which shall prescribe that it shall be contracted for and done in sections or parts as the Assembly shall, from time to time, appropriate the money to pay for the same. But in all such cases the work to be done in sections or parts shall be limited to the amount appropriated for the doing of such sections or parts, and in this manner ultimately to complete the work specified.

"Contract Provisions—Suspension of Work on Complaint—B. P. I. to Examine and Report—Cost.—Every contract shall contain a clause to the effect that it is subject to the provisions of the charter, that the aggregate payments thereon shall be limited by the amount of such specified appropriation, and that, on ten days' notice, the work under said contract may, without cost to or claim against the city, be suspended by said Board with the approval of the Mayor, for want of means, or other substantial cause: *Provided*, that on the complaint of any citizen and taxpayer, that any public work is being done contrary to contract, or the work or material used is imperfect or

different from what was stipulated to be furnished or done the said Board shall examine into the complaint and may appoint two or more members of said Board to examine and report on said work, and after such examination, or after considering the report of said commissioners, they shall make such order in the premises as shall be just and reasonable, and what the public interest seems to demand, and such decision shall be binding on all parties; the cost of such examination shall be borne by the contractor, if such complaint is decided to be well founded, and by the complainant, if found to be groundless."

Constitution of Missouri.

Sections 20 and 30 of Article II of the Constitution of Missouri:

"SEC. 20. Private Property Not to be Taken for Private Use—Exceptions—Public Use a Judicial Question.—That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

"SEC. 30. Due Process of Law.—That no person shall be deprived of life, liberty or property without due process of law."

[Endorsed:] 578/24,322. In the Supreme Court of the United States, October term, 1915. No. 578. Gast Realty & Investment Company and Emily Gast, plaintiffs in error, *vs.* Schneider Granite Company, defendant in error. Motion to dismiss writ of error or to affirm or to transfer to the summary docket. Hickman P. Rodgers, New Bank of Commerce Bldg., St. Louis, Missouri, attorney for defendant in error.

15
(No. 24322)

IN THE

United Supreme Court, U. S.

FILED

NOV 29 1915

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

GAST REALTY AND INVESTMENT
COMPANY and EMILY GAST,

Plaintiffs in Error.

vs.

SCHNEIDER GRANITE COMPANY,

Defendant in Error.

No. 211.

Suggestions of Defendant in Error in
Opposition to Motion for Continuance

HICKMAN P. RODGERS,

Attorney for Defendant in Error.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

**GAST REALTY AND INVESTMENT
COMPANY and EMILY GAST,**

Plaintiffs in Error,

vs.

SCHNEIDER GRANITE COMPANY,

Defendant in Error.

} No. 211.

**Suggestions of Defendant in Error in
Opposition to Motion for Continuance**

Defendant in error respectfully suggests that no valid ground has been assigned for the motion to continue the hearing of this cause until the next term of this court. As shown in the motion, judgment herein was rendered on November 10, 1910, in the state court, where the cause had then pended at least a year. The

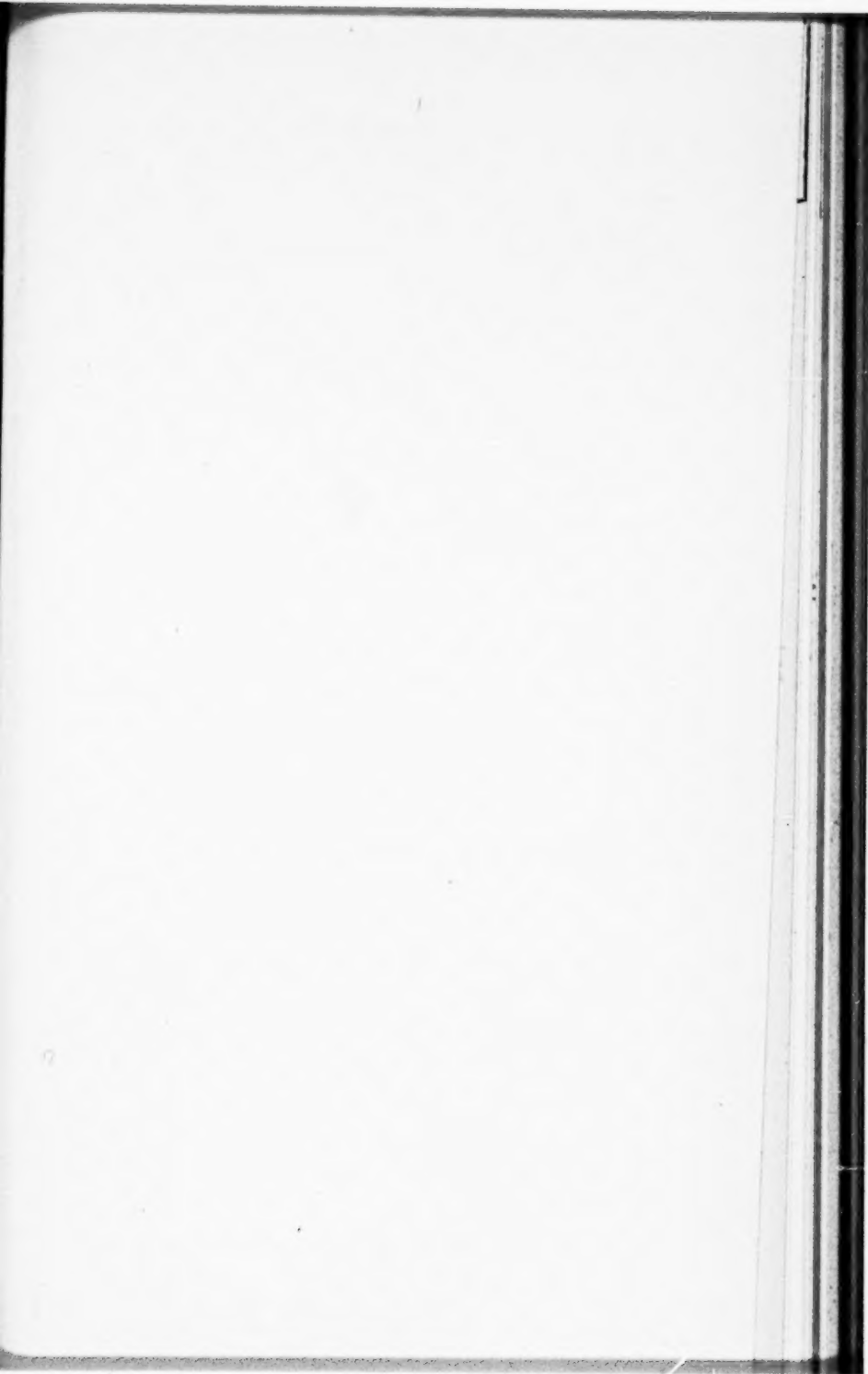
holder of the tax bill has, therefore, been six years in court in an effort to enforce its lien. It may be true, and probably is, that other cases mentioned in said motion are on their way here, even though it has been well settled by this court that the provisions of the Charter of the City of St. Louis do not contravene the Constitution of the United States, it now being the fad in St. Louis to invoke the fourteenth amendment to the Federal Constitution in the defense of suits to enforce special tax bills. It seems absurd to contend that this court should delay the hearing in the present case until the cases on the way can be heard with it. As long as six years will be required for that purpose in some of the cases mentioned as now pending, and no doubt others will be instituted in the meantime.

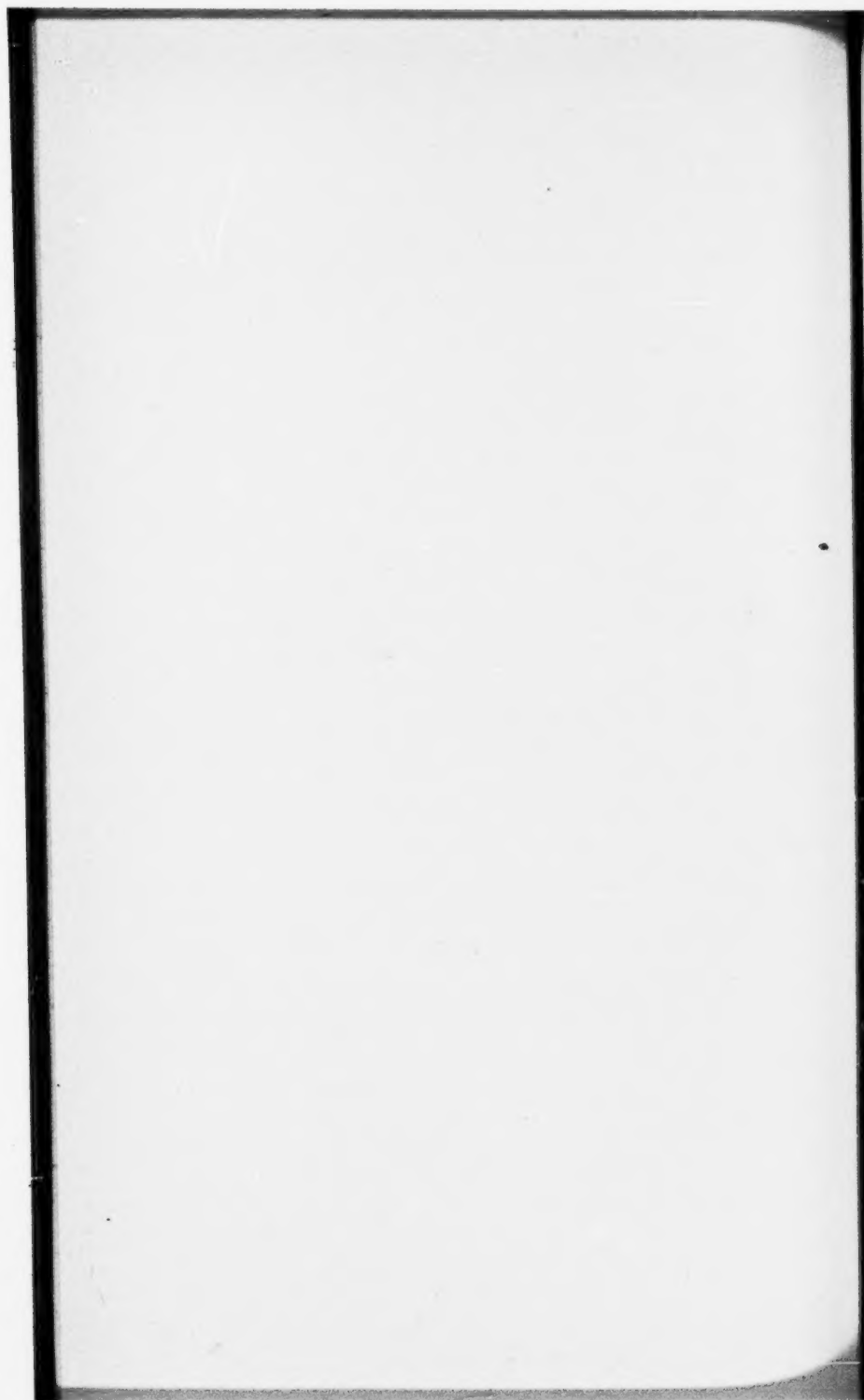
It is respectfully submitted that the situation presented by counsel furnishes a reason for a speedy hearing rather than for delay, since the decision of the present case would be a precedent for the others said to be similar, and thus save inconvenience to the court and expense to the litigants.

The acknowledgment of timely service on counsel in other cases appended to the motion for resetting is ridiculous, they having no connection whatever with the present case. The undersigned is sole counsel for defendant in error and strenuously opposes a postponement of the hearing.

HICKMAN P. RODGERS,

Attorney for Defendant in Error.





NOV 29 1915

JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 211

GAST REALTY AND INVEST-
MENT COMPANY and
EMILY GAST,

Plaintiffs in Error,

vs.

SCHNEIDER GRANITE COM-
PANY,

Defendant in Error.

In Error to the Supreme Court of Missouri.

Motion for Resetting of this Case

ROBERT A. HOLLAND, Jr.,
THOMAS G. RUTLEDGE, and
J. M. LASHLY,

Attorneys for Plaintiffs
in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 211

GAST REALTY AND INVEST-
MENT COMPANY and
EMILY GAST,

Plaintiffs in Error,

vs.

SCHNEIDER GRANITE COM-
PANY,

Defendant in Error.

In Error to the Supreme Court of Missouri.

Motion for Resetting of this Case

Come now the plaintiffs in error and respectfully pray the Court to continue the hearing of this cause until the next term of this Court for the following reasons:

There are pending in this Court, or are on their way to this Court, several cases involving the same questions that are involved herein and particularly involving the important questions that the scheme and theory of special taxation, as contained in Section 14 of Article VI of the Charter of the City of St. Louis, as well as the said charter provision itself and the application thereof, are wrong, vicious, unequal, unjust, discriminatory and confiscatory. It results in taxation of property not benefited and is an arbitrary and capricious rule which cannot be justly applied to unplatted tracts of land.

This case is brought here on a writ of error to the Supreme Court of Missouri from a judgment for \$16,713.74 rendered on November 10, 1910, where three-quarters of the cost of the improvement is assessed on the area basis against the district. It is contended by plaintiff in error that the charter provision for fixing the district line half-way between the improved street and the next parallel street, as well as the theory and method of its application to unplatted and unsubdivided tracts of land or acreage property where the next parallel street is far distant, is unconstitutional and contravenes the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, both as relates to the due process clause and the equal protection clause.

That in the case at bar a large, unplatted tract of land approximately 1,000 feet square is assessed to one-half of its depth, although the remoter portions of the property assessed derive no benefit whatever from the improved street, and some of the property of other

land owners abutting on the improved street is assessed for a depth of only 27 feet, 40 feet and 60 feet.

That there is also pending in this court another case involving the construction of the same charter provision and of the method of its application, to-wit: **William W. Withnell vs. Wm. R. Bush Construction Company, No. 563**, which will probably not be reached for a hearing until the October term, 1916, of this Court; that in said case plaintiffs in error own a large unplatted tract of land, none of which abuts on the improved street, none of which is within 300 feet of it, some of which is 600 feet removed from the improvement, which is nevertheless charged with one-sixth of the total cost.

That another such case, to-wit: **Rebecca Loth et al. vs. City of St. Louis, No. 190**, is set for hearing at the present term of this Court, but will probably not be reached for hearing until late at the term. In this case, although the property of the plaintiff in error has a frontage of less than one-seventh of the aggregate frontage of the improvement, it is assessed for one-fourth of the total cost thereof owing to the fact that the property of the plaintiff in error therein is a large unplatted tract of land.

That there is another case involving the same question now before the state courts of Missouri, which your petitioner is advised the parties intend to bring to this Court, in which the next parallel street to the improved street is 8,300 feet distant, and through which unplatted tract of land it is contemplated that at least 27 streets will hereafter be made when the tract is subdivided, and where the district line is drawn

to a depth of 4,165 feet, while the land on the opposite side of the improvement was assessed to a depth of only 150 feet.

That plaintiffs in error in the case at bar are advised by the clerk of this Court that the present case is likely to be reached the latter part of January, 1916.

That your petitioners believe that because of the great public interest in the questions involved in this case and in the other cases referred to that the matters and points in issue could better be presented to this Court if all of said cases were heard and presented in this Court at the same time, and your petitioners also believe that the time and convenience of this Court would probably be better subserved if this were done.

WHEREFORE, plaintiffs in error respectfully ask the Court that this case and the other cases hereinabove named be set down to be heard by this Court at the same time, on such day as may suit the convenience of this Court.

ROBERT A. HOLLAND, Jr.,
THOMAS G. RUTLEDGE, and
J. M. LASHLY,

Attorneys for Plaintiffs
in Error.

State of Missouri, }
City of St. Louis. } ss.

Alex. Gast, being duly sworn, on his oath, states that he has read the foregoing petition and that the facts therein stated are true to the best of his knowledge and belief.

ALEX. GAST.

Subscribed and sworn to before me this 10th day
of November, 1915.

My commission expires May 27, 1916.

(SEAL)

M. W. HUTTON,
Notary Public.

NOTICE OF MOTION.

The defendant in error in this case and the parties in cause No. 190, Rebecca Loth et al. vs. City of St. Louis, and the parties in cause No. 563, William W. Withnell vs. William R. Bush Construction Company, are hereby notified that the plaintiff in error herein will on the 29th day of November, 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing motion.

ROBERT A. HOLLAND, Jr.,
THOMAS G. RUTLEDGE, and
JACOB M. LASHLY,

Attorneys for Plaintiffs
in Error.

Timely service of the foregoing motion is hereby acknowledged.

Attorney for Defendant in Error.

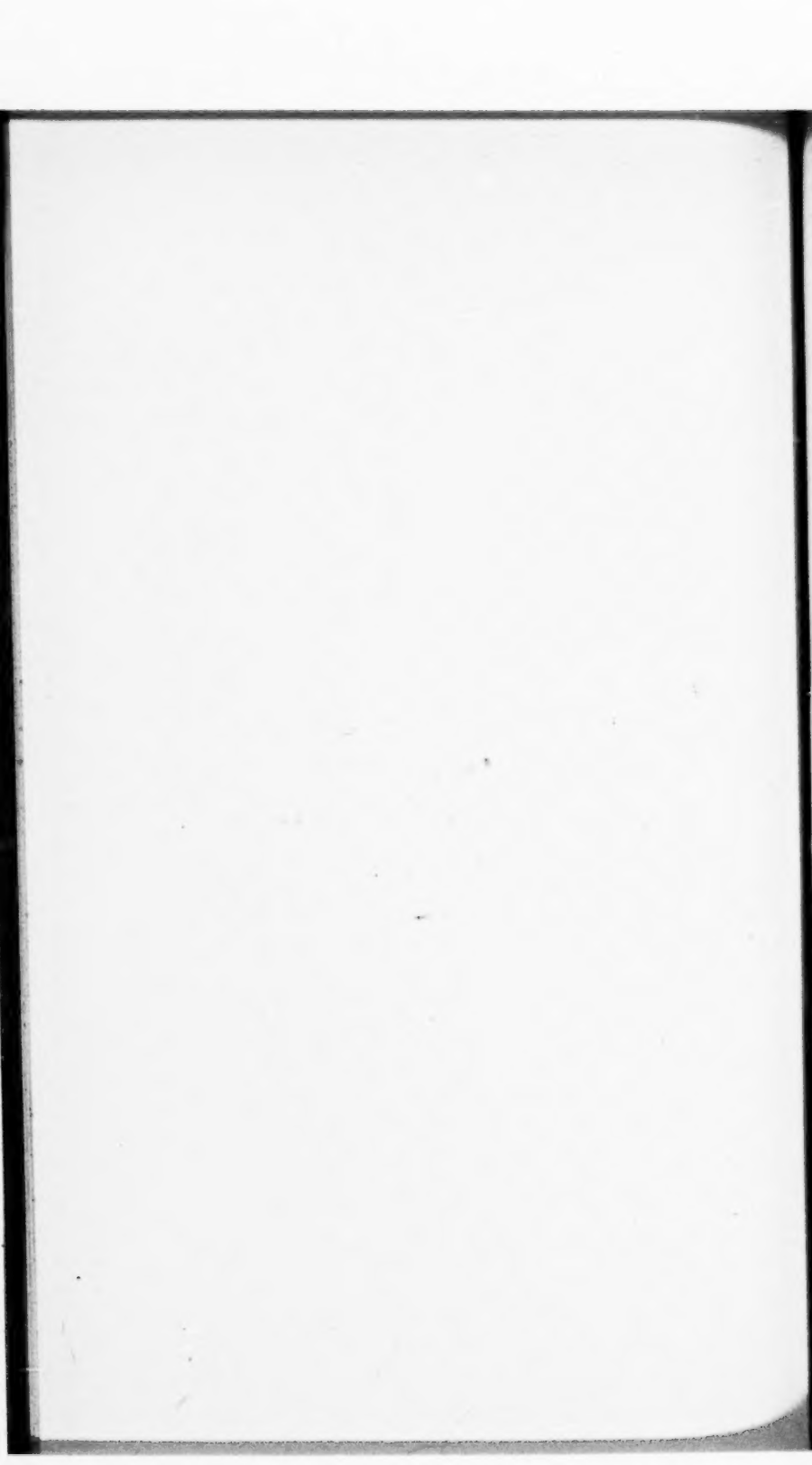
Attorney for Wm. W. Withnell,
Cause No. 563.

Attorneys for Wm. M. Bush Const. Co.,
Cause No. 563.

Attorneys for Rebecca Loth,
Cause No. 190.

Attorneys for City of St. Louis,
Cause No. 190.

The original copy with proof of service
has receipt of copy acknowledged
all except Edward C. Kahr atty for
the Bush Const. Co on whom proper
service was made



Office Supreme Court, U. S.
FILED
NOV 29 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 211

GAST REALTY AND INVEST-
MENT COMPANY and
EMILY GAST,

Plaintiffs in Error,

vs.

SCHNEIDER GRANITE COM-
PANY,

Defendant in Error.

**FURTHER SUGGESTION OF PLAINTIFF IN
ERROR ON MOTION FOR CONTINUANCE OF
HEARING UNTIL THE NEXT TERM
OF THIS COURT.**

ROBERT A. HOLLAND, JR.,
THOMAS G. RUTLEDGE,
JACOB M. LASHLY,
Attorneys for Plaintiff in Error.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915

No. 211

**GAST REALTY AND INVEST-
MENT COMPANY and
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Plaintiffs in Error,

vs.

**SCHNEIDER GRANITE COM-
PANY,**

Defendant in Error.

**FURTHER SUGGESTION OF PLAINTIFF IN
ERROR ON MOTION FOR CONTINUANCE OF
HEARING UNTIL THE NEXT TERM
OF THIS COURT.**

Since filing our motion for continuance herein we have received information that the present cause is not likely to be reached until March, 1916.

In view of the remark contained in the suggestion of defendant in error that the situation presented furnishes a reason for a speedy hearing rather than delay, we desire to say that the provisions of the charter of the City of St. Louis, under which this question has arisen, were abrogated about a year ago and that the effect of delay upon persons who are not parties to the action at bar, will be beneficial rather than harmful, since the amount of special tax bills in which the question may be presented will be lessened through payment and cannot be increased.

ROBERT A. HOLLAND, JR.,

THOMAS G. RUTLEDGE,

JACOB M. LASHLY,

Attorneys for Plaintiff in Error.

Timely service of the foregoing suggestions is acknowledged.

HICKMAN P. RODGERS,
Attorney for Defendant in Error.

FILED

NOV 20 1915

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 211.

GAST REALTY & INVESTMENT COM-
PANY, a Corporation, and EMILY
GAST,

Plaintiffs in Error.

vs.

SCHNEIDER GRANITE COMPANY, a
Corporation,

Defendant in Error.

In Error to the Supreme
Court of Missouri,
October Term, 1915,
No. 24,320.

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

ROBERT A. ROLLAND, Jr.,
THOMAS G. RUTLEDGE,
JACOB M. LASHLY,

Attorneys for Plaintiffs in Error.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 211.

GAST REALTY & INVESTMENT COM-
PANY, a Corporation, and EMILY
GAST,

Plaintiffs in Error,

vs.

SCHNEIDER GRANITE COMPANY, a
Corporation,

Defendant in Error.

In Error to the Supreme
Court of Missouri,
October Term, 1915.
No. 24,320.

**STATEMENT, BRIEF AND ARGUMENT OF
PLAINTIFFS IN ERROR.**

STATEMENT.

This was a suit instituted in the Circuit Court of the City of St. Louis, Missouri, by the Schneider Granite Company, a corporation, paving contractor, against

Gast Realty & Investment Company and Emily Gast, owners of a tract of land fronting on Broadway, a street in St. Louis, for the purpose of enforcing the lien of a tax bill issued by that city in part payment of the cost of paving said street. The work was done under an ordinance of the city and conformably to its charter. The total cost of the improvement was by the ordinance required to be, and was in fact, levied and assessed as a special tax, in accordance with Section 14 of Article VI of the Charter, which provides that one-fourth of such cost shall be levied and assessed upon all the property fronting upon or adjoining the improvement, according to frontage on the improvement, and three-fourths of such cost shall be levied and assessed according to area upon all the property in the district ascertained as hereinafter stated. The method for ascertaining such benefit district (which is the bone of contention here) is prescribed by said Charter (Sec. 14, Art. VI) as follows:

“A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. * * * If there is no parallel or converging street on either side of the street improved, the district lines shall

be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located."

The construction placed upon this provision by the Supreme Court of Missouri eliminated the two exceptions therein as applicable to unplatted property so that we have to deal only with the general rule that the midway or district line is to be drawn half way between the improved street and the next parallel street, whether it be near or remote and whether the intervening property be unplatted acreage property or subdivided into lots and blocks.

The total frontage of property on the improvement, counting both sides of the street, was 4,372 feet. The property of the defendants (plaintiffs in error) is a large unplatted tract of land containing about twenty (20) acres with a front of 1,083 feet on the west side of the improvement and a depth westwardly of nearly 1,000 feet to Church Road, the next "parallel or converging street" at that point. On all four sides of this tract the property was platted and subdivided into blocks and lots. The defendants' property alone was unplatted and unsubdivided. We do not believe it out of place to state that since the issuance of the tax bills

two streets have been extended through this property. The plat in evidence (Transcript, opposite p. 62) shows one of these streets, Jordan street. Through defendants' property, therefore, the benefit district line (following the plan of the Charter) was drawn about 500 feet away from Broadway and included as part of the assessment area all of the defendants' property between said line and Broadway. On the east side of Broadway, however, behind the lots opposite defendants' land, there was a street (Lowell) which for 1,384 feet is parallel to Broadway and only about 300 feet distant therefrom. Through these lots, therefore, for about 1,400 feet along the improvement, the district line was drawn only about 150 feet distant from Broadway. On the same (east) side of Broadway there was a large tract of land having a front on Broadway of 695 feet by a depth eastwardly of about 1,500 feet. Through said tract there was no parallel or converging street between Broadway and the river, which forms the eastern boundary of the city; therefore, the district line (following one of the exceptions in the charter provision hereinbefore set forth) was drawn parallel to Broadway and at the average distance of the opposite district line of about 240 feet. Within the taxing district there are also three triangular blocks which have a total frontage upon the improvement of nearly 1,000 feet, yet, because of the nearness of next converging streets, the benefit district line is drawn through them at an average distance of only

100 feet. Through some of the lots in them the district line is distant only 25 feet; through one with a front of 254 feet the line is drawn at an average distance of less than 60 feet; through another with a front of 285 feet it is drawn at an average distance of only 80 feet. Through one end of the first lot south of defendants' property, and on the same (west) side of Broadway, the district line is distant only 40 feet from Broadway. Because of such varying of the distances of the district lines from the improvement, made necessary by the terms of the Charter, a large area, situated with respect to the improvement similarly to defendants' property included in the benefit district, is omitted from the benefit district, and as a result defendants' property, though having a frontage on the improvement of less than one-fourth of the entire frontage, was assessed for \$14,522.65, or more than one-third of the total cost of the entire improvement, which was \$42,291.51. The amount assessed against plaintiffs in error on account of that part of its property lying back of a line drawn parallel to Broadway and distant the average distance from the district line on the opposite side of Broadway, to-wit, 165 feet, is over \$9,000.00.

It was pleaded and contended by the defendants (Tr., pp. 23, 24) that Church Road (west of defendants' property) should not be considered the next parallel or converging street on the west side of Broadway, but because, as stated, defendants' property was

unplatted and was so deep and was eventually to be divided into city blocks and to have three certain existing public streets extended through it between Broadway and Church Road and parallel thereto, which must be improved at the expense of defendants' property, there was, within the meaning of the Charter, no parallel or converging street to Broadway, and the benefit district line should not have been drawn through defendants' property half way between Broadway and Church Road, but should have been drawn through such property at a distance west of Broadway equal to the average distance east of Broadway, or about 165 feet. It was further pleaded and contended by the defendants that if Section 14 of Article VI of the Charter aforesaid be so construed as to include within the benefit district for the improvement of said Broadway the said property of the defendant described in plaintiff's amended petition, then said Section 14 of Article VI of said Charter is illegal and void, in that said section of said Charter, if so construed, would impose grossly unequal, unfair and inequitable burdens upon that part of defendants' above described property west of a line drawn across this defendants' property at a distance west from Broadway equal to the average distance of the opposite district line from said Broadway on the east side thereof; and, if so construed and enforced, would deprive the defendants of the equal protection of the laws and deprive defendants of their property without due process of law, contrary

to Section 1 of Article XIV of the Amendments to the Constitution of the United States, and contrary to Section 20 of Article II of the Constitution of Missouri, and contrary to Section 30 of Article II of the Constitution of Missouri.

The judgment of the Circuit Court of the City of St. Louis was for the plaintiff company for \$16,713.74, the amount purporting to be due on the tax bill, with penalties, and for the enforcement of the lien. From this judgment an appeal was taken to the Supreme Court of the State of Missouri, and on June 23, 1914, the judgment of the Circuit Court was affirmed, and thereupon a writ of error from this Court was allowed.

The Federal question was properly presented at the trial and was again urged in the motion for new trial after adverse judgment in the trial court (Tr., p. 64) and the opinion of the Supreme Court of Missouri in this case (Tr., p. 71) treats the constitutional questions as being sufficiently raised and specifically deals with them and decides them adversely to plaintiffs in error, saying in that connection (p. 71):

“It is contended that that portion of the western boundary of the benefit district affecting the property involved in the present tax bill was erroneously fixed one-half way between Broadway and Church Road, and further, that if the Charter of St. Louis be construed to authorize the fixing of the boundary line in such manner, then said Charter provision is in conflict with the Fourteenth

Amendment to the Constitution of the United States and with Sections 20 and 30 of Article II of the Constitution of Missouri. * * *

“The point here raised has been fully discussed and directly passed upon by this Court in a number of decisions. No present reason appears why the subject should again be discussed at length, but for the purpose of the present case, it is sufficient to say that the rule has become firmly established by former opinions of this Court to the effect that the Charter of St. Louis does provide for the fixing of the boundary line of the benefit district as the same was fixed at the place above mentioned in the case at bar, and that such Charter provision does not conflict with any of the above-mentioned constitutional provisions (*Granite Bituminous Paving Co. v. Fleming*, 251 Mo. 210; *Gilsonite Co. v. Fair Assn.*, 231 Mo. 589; *Fruin-Bambrick Const. Co. v. St. Louis Shovel Co.*, 211 Mo. 524).”

ERRORS RELIED UPON.

1. The Supreme Court of the State of Missouri erred in holding in this cause (Tr., p. 9) that the provisions of Section 14 of Article VI of the Charter of the City of St. Louis do not provide for the taking of property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Missouri erred in holding in this cause (Tr., p. 9) that the provisions of Section 14 of Article VI of the Charter of the City of St. Louis do not deny to persons within the jurisdiction of the City of St. Louis, Missouri, and particularly such persons owning land in said city, including plaintiffs in error, the equal protection of the law.

3. The application of Section 14 of Article VI of the Charter of the City of St. Louis to acreage tracts and unsubdivided and unplatted tracts of land along with regular subdivisions of blocks and lots results in denying plaintiffs in error the equal protection of the law and in taking their property without due process of law.

POINTS AND AUTHORITIES.

I.

A single legislative rule for fixing benefit districts in a city for special assessments for street improvements alike for platted and unplatted districts by providing that the district line be drawn half way between the improved street and the next parallel street, no matter how far distant that street may be, and, although property may be subdivided and platted on one side of the improvement so that the next parallel street is far distant, is repugnant to the Fourteenth Amendment to the Constitution of the United States.

City of Louisville v. American Asphalt Co., 125 Ky. 497, 504;

Cooper v. Nevin, 90 Ky. 85;

McGrew v. Kansas City, 64 Kan. 61;

Gilsonite, Etc., Co., v. St. Louis Fair Assn., 231 Mo. 589;

Granite Bitum. Pav. Co. v. Fleming, 251 Mo. 210;

Loth v. City of St. Louis, 257 Mo. 399;

Schneider Granite Co. v. Gast Realty Co., 259 Mo. 153, *l. c.* 164, Transcript p. 71.

II.

The effect of this Charter provision of the City of St. Louis is clearly shown in numerous reported decisions of the Supreme Court of Missouri in which it was passed upon and applied to platted and unplatted

tracts, regardless of the resulting injustice and inequality.

Gilsonite v. St. L. Fair Assn., 231 Mo. 589, 594;
Granite Bitum. Pav. Co. v. Fleming, 251 Mo. 210,
216, 218;

Loth v. City of St. Louis, 257 Mo. 399, 406, 409,
413;

Bush Const. Co. v. Withnell, 185 Mo. App. 408.

III.

This Court can take judicial notice of the streets of the City of St. Louis, their relation to and distance from each other and of the fact that there are in such a city whose bounds are established by public law, and therefore judicially known, large unplatted tracts of land lying in close proximity to land which is subdivided.

Redell v. Moores, 63 Neb. 219;

Williams v. State, 64 Ind. 553, 555;

Stout v. Board of Commissioners, 107 Ind. 343,
348;

Endlich Interpretation of Statutes, Sec. 29;

Greenleaf on Evidence (Lewis Ed.), Vol. I,
Sec. 6;

Paving Co. v. Verso, 12 Cal. App. 362;

Brady v. Page, 59 Cal. 52;

Stealey v. Kansas City, 179 Mo. 400, 407;

Skelly v. Railroad, 27 N. Y. Supp. 304;

McMaster v. Morse, 18 Utah 21, 27;

State *ex rel.* v. Consumer Power Co., 119 Minn.
225;

Gardner v. Eberhard, 82 Ill. 316, 321;

Wigmore, Evidence, Vol. V (2nd Ed.), Sec. 2571,
pp. 673-4;

Jones v. United States, 137 U. S. 202, 216;

State *ex rel.* v. Seibert, 130 Mo. 202;

Haaren v. Mould, 122 N. W. Rep. 921, 144 Iowa
296.

IV.

The power of the Legislature in providing for the assessment of special taxes for local improvements is not unlimited. Any rule or proceedings which arbitrarily charges land with an assessment greater than the benefits, is, to the extent of the excess, a taking of private property for public use without compensation.

People v. Salem, 20 Mich. 452, 474;

Dietz v. City of Neenah, 91 Wis. 422, 427;

Norwood v. Baker, 172 U. S. 269, 278;

4 Dillon, Municipal Corporation (5th ed.), Sec.
1443, p. 2567;

Cooley, Taxation (2d ed.), 661;

State, Agens v. Mayor, Etc., Newark, 37 N. J.
L. 415, 421;

Stuart v. Palmer, 74 N. Y. 183, 189;

King v. Portland, 38 Ore. 402, 414;

Preston v. Roberts, 12 Bush. (Ky.) 570, 585;

Fulkerson v. Bristol, 105 Va. 555, 561;

Hyattsville v. Smith, 105 Md. 318, 322;

Martin v. Dist. of Columbia, 205 U. S. 135, 139;

Davidson v. New Orleans, 96 U. S. 97, at 104,
108;

2 Page & Jones, Taxation by Assessment, Sec.
665, p. 1141;

White v. Gove, 183 Mass. 333, 336;
Cotting v. Goddard, 183 U. S. 79, 110;
Gilsonite v. Fair Assn., 231 Mo. 589;
People v. Salem, 20 Mich. 452, *l. c.* 474;
Hagar v. Reclamation Dist., 111 U. S. 701, 708;
Railroad v. Barber Asphalt Co., 197 U. S. 430.

V.

A general, prospective law, providing for the apportionment of the cost of an improvement, must, in order to be valid, provide for the apportionment by some rule capable of producing reasonable equality between the parties assessed and a fair distribution of the tax proportionately to the benefits.

See cases cited under IV.

VI.

The charter provision in this case is invalid because the rule provided by it for the apportionment of the cost of the improvement is not capable of producing reasonable equality between the parties assessed, is not based upon the idea of benefits, and makes equality and justice and apportionment according to benefits legally impossible. It is a vicious, arbitrary and capricious rule which cannot be justly applied to unplatted tracts of land, and its application results in gross inequality and injustice and practical confiscation.

See cases cited under Paragraph IV.

ARGUMENT.

I.

The Nature of the Question Involved.

It will be observed from what we have stated that, at the outset, our pleading and contention was in the alternative. We alleged and contended, in the first place, that the Charter provision of the City of St. Louis for a taxation to the midway line between the street improved and the next parallel or converging street contemplated that the land subjected to assessment on this basis had been subdivided, so as to produce a next parallel or converging street within the spirit and reasonable application of the rule, and consequently within a reasonable distance; and we alleged and contended, in the next place, that if this construction was not placed upon the Charter, and if the rule of assessment was made applicable indiscriminately to platted and unplatted lands and to all parallel or converging streets, no matter how far distant some of these might be from the street improved, then the Charter provision was repugnant to the Constitution of the United States and was accordingly invalid.

A condition somewhat similar to the one here presented was produced by a statute of Kentucky. There the statute, as we understand it, provided practically for assessment to the middle of each square or block

fronting on the improvement, and it specifically defined a square as territory surrounded by four principal streets.

In *City of Louisville v. American Asphalt Company*, 125 Ky. 497, a case arose wherein the distance between the west side of the street improved and the next street to the west was about fifteen hundred feet, and an unsubdivided tract of forty-seven acres between these two streets fronted on the improvement, and it happened that this unsubdivided tract was surrounded by four principal streets, so that it came within the letter of the statutory definition of a square. Accordingly it was claimed that this tract should be assessed to the extent of one-half of its area. The Court of Appeals of Kentucky, however, held that the statute for midway taxation was not intended to apply under this condition and that the tract should, therefore, be assessed only to the same depth to which land on the opposite side of the street was assessed.

The Court of Appeals of Kentucky made a similar application of the statute in *Cooper v. Nerrin*, 90 Ky. 85. In that case a tract of thirty acres fronted on one side of the improvement, and streets parallel to the improved street ran to this tract, but were not projected through it. The Court, however, made the following holding, as appears from the following quotation from the second syllabus to the case:

*Where the territory on one side of the improved street has been defined into ordinary

squares, the territory on the other side, although it has, in fact, not been thus subdivided, will, if bounded by principal streets, be treated as if the cross streets at right angle to the improved street had been extended through the territory on that side."

In *Gilsonite, Etc., Co. v. St. Louis Fair Association*, 231 Mo. 589, the effort was made to have the same construction given to the Charter provisions under consideration which was given to the similar statute of Kentucky, to which we have referred. It was there contended that the Charter provisions in question did not apply to large unplatted tracts of land, but that such tracts should be treated as coming within the exceptions expressly made by the Charter provisions of the City of St. Louis to the general rule of midway taxation and should accordingly be assessed to the depth of three hundred feet when there was no next parallel or converging street on either side of the street improved and should be assessed to the average depth to which the land on the opposite side of the improved street was assessed, where there was a next parallel or converging street on that side.

But the Supreme Court of Missouri refused to follow the precedent established by the decisions in Kentucky and held substantially that unplatted or unsubdivided tracts of land were governed by the letter of the Charter provision and were accordingly assessable to the midway line between the street improved and the next

parallel or converging street, regardless of the extent of the distance between the two streets, and consequently, regardless also of the inequalities produced by this method of taxation. In short, the rule of taxation to the midway line between the street improved and the next parallel or converging street was practically held to be inflexible.

This construction, thus adopted in the St. Louis Fair Association case, was followed by the Supreme Court of Missouri in *Granite Bituminous Paving Co. v. Fleming*, 251 Mo. 210; *Loth v. City of St. Louis*, 257 Mo. 399, and in the case at bar (259 Mo. 153, *l. c.* 164) the St. Louis Fair Association case and the Fleming case being, in the opinion in the case at bar, cited in support, as appears from the quotation made in our foregoing statement from that opinion.

We take it that the construction thus placed by the Supreme Court of Missouri upon the Charter provision in question is conclusive, and that the only question, therefore, left for determination in this Court is whether the Charter provision of the City of St. Louis, thus construed, is repugnant to the Constitution of the United States.

II.

**The Effect of the Charter Provisions of the City of
St. Louis, as Disclosed by Decisions of the
Appellate Courts of Missouri.**

The effect of these provisions, as construed by the Supreme Court of Missouri, appears, in the first instance, from the reported decisions of that Court. The first of these decisions is the *St. Louis Fair Association case, supra*. The facts of that case, as set forth in the opinion of the Court, were as follows:

The property of the defendant consisted

“of a tract of land of 132 acres, having a front on Grand avenue of 1,474.88 feet by a depth of 3,895.83 feet, which has never been divided into city blocks, nor have any streets or alleys been cut through it. * * * The land on the other side of Grand avenue fronting west is divided into lots and blocks by streets and alleys, and so also is the land north and south of defendant's property fronting west on Grand avenue. In laying out the district to be assessed for the payment of the improvement the ordinance draws the east boundary, varying according to the depth and width of the lots, from 320.5 feet to 120 feet east of Grand avenue and draws the west line through lots north and south of defendant's property fronting east on Grand avenue at an average depth of 202 $\frac{1}{4}$ feet, whilst through defendant's property the west line is drawn half way between Grand avenue and Fair avenue, thereby including defendant's property

to a depth of 1,947.5 feet for its whole width from Natural Bridge Road to Kossuth avenue. From Grand avenue west through defendant's property Fair avenue is the next parallel or converging street. The total frontage of the street improved, counting both sides, is 4,087.73 feet, of which the frontage of defendant's property is 1,474.88 feet. The total cost of the improvement was \$23,278.62, of which \$16,974.51 was assessed against defendant's property" (231 Mo., *l. c.* 594).

It will thus appear that the frontage of the defendant's property was a little more than one-third of the entire frontage on the improvement, but that the assessment against the defendant's property was more than two-thirds of the entire cost of the improvement, and that this discrepancy was due to the fact that the defendant's property, owing to its being unsubdivided and to the consequent great distance between the street improved and the next parallel street, was assessed to a depth of 1,474.88 feet, while the property immediately adjoining it on either side, owing to its having been subdivided and to the consequent shorter distance to a parallel street, was assessed to an average depth of $202\frac{1}{4}$ feet, and the property on the opposite side of the improved street, owing to the same causes, was assessed to depths varying from 120 feet to 320.5 feet.

Nor was this all. It will be borne in mind that the assessment under the Charter provisions, which we are considering, consists of a frontage tax for twenty-five

per cent of the cost of the improvement and of an area tax for the remaining seventy-five per cent of that cost. To the frontage tax there is no objection. The entire discrepancy in the assessment to which we have just referred and the ground of objection to assessments in all cases results from the area tax, and in the St. Louis Fair Association case the following further appears (231 Mo. 596):

“This resulted in the inequality complained of in defendant’s answer; that is, that of a total area of 3,316,016 square feet in the district, 2,867,790 feet were taken in defendant’s property, and of a total area tax of \$17,458.95, the sum of \$14,874.74 was assessed against defendant’s property.”

In other words, the defendant’s property, having a frontage of a little more than **one-third of the entire frontage** on the improvement, **was made to bear more than five-sixths of the entire area tax.**

In the case just referred to a writ of error was sued out from this Court, but the parties disposed of the controversy amicably and the writ of error was then dismissed. Accordingly, a transcript of the record in the case must be contained among the files in this Court.

In the next case, *Granite Bituminous Paving Company v. Fleming*, 251 Mo. 210, the following appears, at page 216:

In that case Delmar avenue was the street improved

and it ran east and west. On the north side of Delmar avenue the next parallel or converging street was Von Versen avenue, and it was distant 350 feet from the street improved,

“so that the assessment district on that side of Delmar avenue was only 175 feet deep, but on the south side of Delmar avenue the nearest parallel street is Waterman avenue, distant from Delmar avenue 1,438 feet, so that the benefit district on the north side of Delmar avenue is 719 feet deep.”

The property of the defendant in that case **did not** front at all on Delmar avenue, the street improved; on the contrary, its nearest point to Delmar avenue was distant 450 feet southwardly of that avenue, and the answer in the case, besides setting forth these facts, alleged further

“that the entire tract or parcel of land between the said Delmar boulevard on the north and the said Waterman avenue on the south and DeBali-viere avenue on the east and the proposed western line of Hamilton avenue on the west is vacant and unimproved property and has never been platted and laid out in lots and blocks, nor has it any streets dedicated therein, but that if the plan of the City of St. Louis is carried out as the same exists immediately east of this tract of land, there will be laid out through said tract four streets running east and west, which streets will be between and parallel with the said Delmar boulevard and said Waterman avenue; that said streets have already been surveyed” (251 Mo., *l. c.* 217). (The

bold-face type is contained in the opinion in italics.)

The allegations which we have quoted from the answer and additional allegations in the same connection were stricken out on motion of the plaintiff, on the ground that they constituted "no defense or manner of defense to plaintiff's action". The defendant refused to plead further, and judgment in favor of the plaintiff consequently followed. The allegations thus stricken out tendered the only issues presented by the appeal of the case (251 Mo., *l. c.* 220).

Inasmuch as these allegations were stricken out on motion, the Court was bound to consider them as true, and the same may be said of the additional allegations contained in the answer and stricken out as to the character of the assessment district and the area tax. The allegations in that regard were to the effect that the area of the entire assessment district consisted of 2,059,165 square feet; that of this total area, 398,679 square feet lay north of Delmar boulevard and 1,660,486 square feet lay south of that boulevard;

"that of the three-fourths of the total cost of improvement for said Delmar boulevard, \$4,438.08 has been assessed against that portion of said district lying north of said Delmar boulevard, and \$18,484.50 has been assessed against that portion of the district lying south of said Delmar boulevard" (251 Mo., *l. c.* 217, 218).

In other words, although the frontage on the north side of the street improved was the same as the frontage on the south side, the area tax against the land on the south side was more than five times as great as the area tax against the land on the north side.

The case of *Loth v. City of St. Louis*, 257 Mo. 399 (at present pending in this Court on writ of error), next came before the Supreme Court of Missouri. In that case suit was brought to enjoin an improvement, one of the grounds of the action being that the Charter provisions providing for the assessment were in conflict with the Constitution of the State and of the United States. The land of the complainants had a front of 1,350 feet on the street improved, being less than one-seventh of the aggregate frontage, the length of the improvement being 5,162 feet (on either side), and it was admitted that the assessment against the land under the provisions of the Charter would exceed one-fourth of the total cost of the improvement, which was \$58,110 (257 Mo., *l. c.* 406).

The complaint set forth the provisions of the Charter and the conditions prevailing in the City of St. Louis to which these provisions applied, a part of the allegations in that connection being as follows:

“That there are, and at the time of the adoption of said provisions of said Charter there were, many other unimproved streets in said city having no parallel or converging street within a distance of two thousand feet of either side thereof,

and also many unimproved streets having a parallel or converging street within three hundred feet on the one side, but not within five thousand feet on the other side, and also many other streets which for a part of their course have, and at the time of the adoption of said provisions of said Charter had, a parallel or converging street on one side which was less than three hundred feet distant, but for the remainder of their course have, and at said time had, no parallel or converging street within a distance of five thousand feet; that in consequence of the said conditions existing at the time of the adoption of said provisions of said Charter, and still existing, the aforesaid provisions require assessments for the improvement of streets which are grossly disproportionate, arbitrary and unfair, and confiscatory of property against which they are made and which place upon a small part of the property benefited by the improvement of a street nearly the entire cost of the improvement of the street, and that this was the case at the time of, and has been the case ever since the time of, the adoption of the aforesaid provisions of said Charter, and that this is the case with respect to the improvement provided for by said ordinance and the aforesaid land of these plaintiffs; that the property owned by these plaintiffs as aforesaid is a large unsubdivided tract of land containing over twenty-two acres and having a depth of over twelve hundred and fifty feet between the north line of said Old Manchester Road, on which it fronts, and the next parallel or converging street northwardly of said Old Manchester Road, to-wit, Bischoff avenue, while for the

greater part of the remainder of said Old Manchester Road between said Kingshighway boulevard and said January avenue, the distance between said Old Manchester Road and the next parallel or converging street on either side thereof is less than three hundred feet, and for a great part of said remainder said distance is less than one hundred and fifty feet" (257 Mo., *L. c.* 409, 410).

The complainants at the trial offered evidence to substantiate the allegations made in their petition with respect to the unconstitutionality of the Charter provisions, which included those hereinabove quoted. This offer was objected to on the ground of the irrelevancy of the evidence, and the objection was sustained. There was, therefore, practically an oral demurrer to the allegations and a consequent admission of them for the purposes of the trial.

The *Loth case* was followed by the case at bar, the facts of which have been set forth in our foregoing statement.

The *Loth case* establishes the finality of the ruling of the Supreme Court of Missouri on this subject. In the *St. Louis Fair Association case* two of the Judges of the Supreme Court of Missouri, namely, Judges Woodson and Graves, dissented both from the construction placed by the majority of the Court upon the Charter provisions and from the majority opinion that the provisions thus construed were constitutional. In the *Loth case* the same view was expressed by these two Judges, they being

“of the opinion that no court should lend its assent to the great inequality, unjust and oppressive results that are characterized by the ruling of this Court in the cases of *Gilsonite Co. v. St. Louis Fair Association*, supra; *Corrigan v. Kansas City*, 211 Mo. 608, and in the case at bar” (257 Mo., *l. c.* 413, 414).

But while these Judges expressly state that their views in this regard had not been changed, they say further that they feel that no good could come from continual dissents, and that they therefore acquiesce in the majority ruling.

Subsequently to all the decisions to which we have referred, the St. Louis Court of Appeals, which is an intermediate court of appeal, had before it the case of *Bush Construction Co. v. Whitnell*, in which the constitutional question now under consideration was raised. That Court has no jurisdiction of any constitutional question, but is required, when a case before it involves such a question, to transfer the case to the Supreme Court of the State. It took that course in the *Whitnell case*, its opinion, when transferring the case, being reported in 185 Mo. App. 408. The Supreme Court, however, retransferred the case to the St. Louis Court of Appeals, which thereon determined it. In the opinion, by which the case was thus determined, the St. Louis Court of Appeals thus refers to the retransfer of the case from the Supreme Court to it:

“Subsequently the Supreme Court returned the case to this Court in the view that the several constitutional questions were concluded by prior decisions of that tribunal.”

It thus appears that the Supreme Court of Missouri considers the question as to the constitutionality of the Charter provisions of the City of St. Louis at rest, and that it refuses to take further cognizance of that question in any case.

After the decision of the *Whitnell* case by the St. Louis Court of Appeals, a writ of error was sued out therein from this Court, and the case is now before this Court on that writ of error. From the record in the case, which is now on file in this Court, it appears that the land of the defendants which was assessed was a large unplatted tract of land which does not abut on the street improved, and none of which is within three hundred feet of the improvement, some being removed as far as six hundred feet from the improvement, and yet this land is charged with approximately one-sixth of the total cost of the improvement. This situation arose by reason of the fact that there are several streets parallel to the improved street which lie quite close to the improved street for seven-eighths of the entire frontage of the improvement, while for the remaining one-eighth of that frontage the next parallel street is thirteen hundred feet distant.

In each of the cases to which we have referred the

basis of the decision was, as we have already in substance indicated, that the Charter provisions were to be applied literally. Given a street improved and a next parallel or converging street, the assessment district was held to run to the midway line between the two, regardless of every other condition.

III.

The Effect of the Charter Provisions as Disclosed by the Application of the Doctrine of Judicial Notice.

The facts regarding the general and gross inequalities resulting from this manner of the establishment of the assessment districts were not pleaded or attempted to be shown in the case at bar, as was done in *Loth v. City of St. Louis, supra*, nor was this essential. This is a matter of which the trial court, and consequently this Court, could, in our judgment, take judicial cognizance.

The Supreme Court of Missouri has said in *Gilsonite, Etc., Co. v. St. Louis Fair Association, supra*, 231 Mo., *l. c.* 589:

“When we are interpreting a written law we must presume that the law writers were cognizant of the conditions about which they were writing and wrote with those conditions in mind”;

and we submit that the Court, in construing and in

considering the constitutionality of the law thus established, must place itself in the same position in which the framers of the law were.

If this were not so, it would follow that the constitutionality of the law would depend upon the acumen and diligence, or the lack of it, shown by counsel on the one side or the other and upon the evidence which each case might disclose, and not upon the actual facts attending the adoption or application of the law. It would consequently follow that the constitutionality of the law would depend upon the vicissitudes of each trial; that there could be no final or conclusive adjudication of the question, and that there would constantly be varying determinations of the question, according to the state of the record in each case.

"In the construction of a statute, courts will take judicial notice of events which are generally known and matters of common knowledge within the limits of their jurisdiction" (Syllabus in *Redell v. Moores*, 63 Neb. 219).

"The history of a country, its topography and condition enter into the construction of the laws which are made to govern it, and we must notice these facts judicially" (*Williams v. State*, 64 Ind. 553, *l. c.* 555, approved in *Stout v. Board of Commissioners*, 107 Ind. 343).

And to the same effect is *Endlich on Interpretation of Statutes*, Section 29:

"In fine, courts will generally take notice of

whatever ought to be generally known within the limits of their jurisdiction” (Greenleaf on Evidence, Lewis Edition, Vol. 1, Sec. 6).

The local Court, sitting in the suits on special tax bills under the Charter of the City of St. Louis, may well be assumed to be cognizant of the general conditions to which the law applied. These conditions are a matter of general knowledge in the vicinity.

In *Paring Co. v. Verso*, 12 Cal. App., 362, s. c. 107 Pac. Rep. 590, which was an action for the enforcement of a local assessment, it was held that “the Court had the right to take judicial notice of the streets, of their boundaries, and of their relation to each other.”

The case of *Brady v. Page*, 59 Cal. 52, was cited in support of this conclusion. The same case was cited by the Supreme Court of Missouri in *Stealey v. Kansas City*, 179 Mo., l. c. 407, where it was recognized that the Court would “take judicial cognizance of the streets of Kansas City and their relation to each other and the direction in which they run.”

In *Skelly v. Railroad*, 27 N. Y. Supp., l. c. 305 (followed in *Re New York City*, 96 N. Y. Supp. 554), it was said:

“We may take judicial notice of the general direction of the streets in the City of New York and where they begin and end, both because such facts are within the general knowledge of its citizens,

and the plan of the city has been approved by law and is laid down on public maps.”

In *McMaster v. Morse*, 18 Utah, *l. c.* 27, it was said:

“It is established that courts will take judicial notice of geographical divisions of counties and incorporated cities, and the Court cannot be ignorant of the fact that Salt Lake City is divided into lots, blocks and streets, which is a fact of such universal notoriety as to render proof unnecessary.”

To the same effect is *State ex rel. v. Consumers Power Company*, 119 Minn. 225, *s. c.* 41 L. R. A. (N. S.), *l. c.* 1185, where it is said:

“It is a matter of common knowledge, and hence properly to be judicially noticed, that cities are divided by streets and alleys into blocks and subdivisions of blocks.”

So it is said in *Gardner v. Eberhard*, 82 Ill., *l. c.* 321, which was approved in *Sever v. Lyons*, 170 Ill., *l. c.* 398;

“The Court will take notice of the subdivision of town and city property into blocks and lots.”

Now, if this may be done, does it not necessarily follow that the Court should also take judicial notice of the fact that there is in a city, and especially a large city like the City of St. Louis, *whose bounds are established by a public law*, and therefore judicially

known, large unplatted and unsubdivided tracts of land; that these lie in close proximity to land which is subdivided, and that gross inequalities in assessment resulting from the establishment of the midway line between the street improved and the next parallel or converging street must necessarily follow in many cases if there be no limitation of distance between the two streets!

The disposition of the Courts and the tendency of the age is towards the elimination of technicality and detail in judicial proceedings where this can be done without serious detriment to the ends of justice. There is, it seems to us, no field of the law where increased liberality in practice can be better used than in the law of evidence, the rules of which have grown out of far more restricted and less complex business relations than now exist; and in no feature of that law can this liberality be more safely practiced than in the law with respect to judicial notice.

We find that a very recent and very favorably known work on evidence (Wigmore on Evidence, Vol. V [2nd ed.], Sec. 2571, bottom pp. 673, 674) contains the following observations on that subject:

“The doctrine of judicial notice contains the kernel of great possibilities, as yet not used, for improving trial procedure in the courts of today. Professor Thayer pointed this out many years ago: ‘Courts may judicially notice much which they cannot be required to notice. That is well worth

emphasizing, for it points to a great possible usefulness in this doctrine in helping to shorten and simplify trials. It is an instrument of great capacity in the hands of a competent Judge, and it is not nearly as much used in the region of practice and evidence as it should be.' * * * The principle is an instrument of a usefulness hitherto unimagined by Judges. Let them make liberal use of it, and thus avoid much of the needless scandal that now is raised by the artificial impotence of judicial proceedings."

In the case at bar this may be done without difficulty and without the slightest risk of error or injury, for the facts may be ascertained readily and with certainty by a mere inspection of the maps of the City of St. Louis and by reference to the official plats of the assessment districts which have been established under the Charter provisions in question. This is unquestionably permissible for that purpose.

Jones v. United States, 137 U. S. 202;

State *ex rel.* v. Seibert, 130 Mo. 202;

Haaren v. Mould, 122 N. W. Rep. 921;

Greenleaf on Evidence, Lewis Ed., Vol I, Sec. 6,
p. 6.

A resort to these sources of information will readily establish all that is alleged in *Loth v. City of St. Louis*, *supra*, and, indeed, more than is there alleged. It will show that the cases before the appellate courts of Missouri, to which we have referred, are instances of general conditions prevailing in all sections of St. Louis,

mere instances of results which the Charter provisions, as construed by the Supreme Court of the State, were bound to produce, and which, from their nature and generality, could readily have been foreseen. It will show that these results are frequently more extreme than those appearing in the *St. Louis Fair Association* case and that in one of them the assessment district is one hundred and fifty feet in depth on one side of the improved street while on the other side it is 4,165 feet deep. It will show instances, of which *Bush Construction Company v. Whitnell, supra*, is illustrative, wherein all the property fronting on one side of the improvement is assessed less than property on the other side which does not at all front upon and is far removed from the improved street. It will show that the same tracts of land are subjected not once, but more often, to this form of unfair and unreasonable assessment, because they are subjected to assessment for several distant streets. And we deem it not out of place to add that cases presenting these excesses in taxation are now pending in the State Court with the expectation of recourse to this court for relief.

We have invoked the doctrine of judicial notice because we believe that its application is justified and will lend force to our argument; its application, however, is not essential, since the ruling of the appellate courts of Missouri, to which we have referred, taken

in connection with the facts appearing in them, sufficiently show the arbitrary effect of the provisions of the Charter of the City of St. Louis, as conclusively construed by the Supreme Court of the State, in the apportionment of special taxes. We may, however, add that the two cases cited from the reports of Kentucky further show that the same results would have followed from the statute of that State, involved in them, if the construction of that statute had been similar to that placed upon the provisions of the Charter of the City of St. Louis.

IV.

The Law Controlling the Apportionment of Assessments for Local Improvements.

The law is well settled that assessments for a local improvement are a form of taxation, predicated upon the benefits produced by the improvement. It has also been held that the determination of the benefit may be legislative or judicial, and that a legislative determination of it is conclusive. The recognition of its conclusiveness, however, has been made only when the legislative provision for it has been fair and reasonable.

An arbitrary apportionment of the cost of a local improvement, one which is at variance with the theory that the tax is levied for benefits produced by the improvement, has never been sanctioned by this Court

or by the current of judicial authority and cannot be sustained upon any ground consistent with constitutional principles. Absolute power in the imposition of any species of taxation upon a small portion of the citizens or property benefited, or in an inequitable distribution of the tax, is irreconcilable with every form of government which is not autocratic; it certainly is irreconcilable with a constitution which prohibits the taking of property without due process of law.

Taxation is unquestionably a taking of property; and an arbitrary taking of property cannot be considered due process of law.

Nor is the prohibition against the taking of property by a state without due process of law the only constitutional safeguard against arbitrary taxation. This is to be found also in the provision of the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the law. The equal protection of the law cannot be said to exist, when the law apportions any public burden unequally among those who bear it.

Indeed, it would seem that it should not be unnecessary to point out any express constitutional provision as prohibitive of unequal taxation. Our very form of government, as indicated by the constitutional declaration that it was formed to "establish justice", is antagonistic to such taxation, and is inconsistent with

favoritism in the distribution either in the benefits or the burdens of the government.

Still, the view that an unequal apportionment of taxation for public improvements is illegal must be taken in a relative and not strictly literal sense. The legislative power of assessment is usually exercised by the enactment of a general rule of apportionment, the ascertainment by inquiry of exact benefits in a special case being really a judicial function; and absolute equality is unobtainable by apportionment through a general rule. A power cannot carry with it that which is inconsistent with its exercise; and the legislative power of assessment for local improvements therefore involves not an obligation for exact justice in the distribution of the tax, but only an obligation for such equality as is practicable. Its exercise is not invalidated merely because it is attended with occasional and inevitable harshness.

But there is no reason why the exceptional harshness thus tolerated should be more than co-extensive with the necessity for it. The fact that a rule cannot be formulated which is perfect in its result is no reason for the allowance of latitude in the formulation of grossly imperfect rules. No man is perfect, but that is no reason for his exemption from responsibility for wrongs committed by him.

But whether or not we have correctly expressed the reasons underlying the law, it is clear from the author-

ities that any legislative taxation for a local improvement is invalid, if it is not calculated to produce approximate equality of taxation, that is, a distribution of the tax proportionately to the benefits for which it is levied.

Upon this subject the Supreme Court of Wisconsin has said in *Dietz v. City of Neenah*, 91 Wis. 422, *l. c.* 427:

“The power of the Legislature to impose taxes and assessments for public purposes is unlimited, except as restrained by constitutional provisions, and is the exercise of the highest attribute of sovereignty; but in all such cases there must be an apportionment of the burden, either among property owners generally or the property specially benefited by the local improvement, the cost of which is to be assessed against such property; and a tax or assessment upon property, arbitrarily imposed, without reference to some system of just apportionment, cannot be upheld.”

Similarly it was declared by the Court of Appeals of New York in *Stuart v. Palmer*, 74 N. Y. 183 at 189:

“But in all cases (referring to general and special taxation) there must be apportionment of the burdens, either among all the property owners of the State, or of the local divisions of the State, or the property owners specially benefited by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding benefit for the excess, and that may

properly be styled extortion or confiscation. A tax or assessment upon property, arbitrarily imposed, without reference to some system of just apportionment, could not be upheld."

And this statement of the law was quoted with approval in *King v. Portland*, 38 Ore. 402, *l. c.* 413, 414, the Supreme Court of Oregon adding (38 Ore., *l. c.* 420):

"This marks the boundary, beyond which it is not within the power of the Legislature to go, even in the determination of benefits as applied to a prescribed district. When, however, it is plainly and palpably manifest from the surroundings (that is, from the character of the work or improvement, the assessment, and from the very nature of things) that such an assessment is not adapted to the purpose, and is requiring of the owner a contribution to which he should not be subjected in that capacity, the Court will interfere to prevent a consummation of the injustice."

So it is said in *Preston v. Roberts*, 12 Bush (Ky.) 570, at 585:

"That there shall be equality, as far as is reasonably practicable in the distribution of public burdens, whether local or general, is a cardinal principle in the law of taxation, and flagrant departures from that rule ought not to be allowed, unless a more equal distribution is, under the circumstances, unobtainable."

To like effect are the following remarks in *Fulkerson v. Bristol*, 105 Va. 555, at 561 :

“A tax upon property owners, according to benefits arising from local improvements, like any other tax, can neither be levied nor collected without special legislative authority, and the burden of such tax must be borne equally and uniformly by all of the owners of the property benefited; therefore, in our view, no matter at what stage in the proceedings to assess and collect the tax the lack of the required equality and uniformity in the burden of the tax is disclosed, the authority to collect or assess the tax ceases.”

A strong expression upon this subject will be found in the following quotation from *State, Agents v. Mayor, Etc., of Newark*, 37 N. J. L. 415, l. c. 421 :

“But while it is thus clear that the burden of a particular tax may be placed on any political district to whose benefit such tax is to inure, it seems to me it is equally clear that, when such burden is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the State, we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it is impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to narrower

bounds than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burden of one of these public improvements can be placed by the force of the legislative will on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burden of a tax upon specified property does not exist. If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed at the houses standing on the four corners of such street, this would not be an act of taxation, and it is presumed no one would assert it to be such. If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit; and the only inquiry is, where that limit is to be placed."

The rule in the State of Michigan is thus expressed in *People v. Salem*, 20 Mich. 452, l. c. 474:

"The tax must be laid according to some rule of apportionment, not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. * * *. Equality in the imposition

of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable."

And the Supreme Court of Maryland has adopted this expression of the rule in *Hyattsville v. Smith*, 105 Maryland 318, *l. c.* 322.

And the following holding in *White v. Gore*, 183 Mass. 333, *l. c.* 336, is instructive because it not only declares but also specifically applies the rule:

"Of course, if a statute shows on its face that it entirely disregards the relation of the benefits to the taxes to be assessed upon the respective estate, it is plainly unconstitutional. In many cases, however, it is impossible to estimate the amount of the benefit with absolute accuracy, and methods of determination must be adopted which are practicable, and which at the same time will give a reasonable approximation to accuracy. The selection of methods is primarily a matter for the Legislature, and much latitude must be allowed it in the exercise of its judgment and discretion in regard to a subject of this kind. It is only when its decision is plainly one that will be likely to result in taxation that is either disproportional or unreasonable that the Court can intervene. So in different cases a great variety of methods have been sustained by the courts as within the legislative authority. In *Sears v. Alderman of Boston*, 173 Mass. 71, it was decided before the decision of the Supreme Court of the United States in *French*

v. Barber Asphalt Co., *ubi supra*, that an assessment by the front foot of measurement on the line of the street was a reasonable way of making a tax proportional to the benefits from watering a street in the thickly settled part of Boston. On the other hand it was held in *Weed v. Mayor and Aldermen of Boston*, and in *Dexter v. Boston*, *ubi supra*, that such a method was not a proportional or reasonable way of determining benefits from the construction of sewers to be built through streets or private lands in all parts of Boston. This was so held because cases might be expected to arise under the statute in which such a method would work great injustice, and the two cases referred to were illustrations of the fact that taxation under the statute would be far from proportional or reasonable."

The text writers have expressed the law in similar terms:

In *Dillon, Municipal Corporations* (5th Ed.), Sec. 1443 (Vol IV, p. 2567), the author observes:

"The decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power is not unlimited and that these assessments must be apportioned by some rule, capable of producing reasonable equality, and that provisions of such a nature as to make it **legally impossible** that the burden can be apportioned with proximate equality, are arbitrary exactions, and not an exercise of legislative authority or of the taxing power."

So it is said in Page and Jones on Taxation by Assessment, Sec. 665, p. 1141:

“One of the most reasonable theories, and one often sanctioned and adopted by the courts, is that an assessment must be limited and apportioned in accordance with the benefits conferred, not by any specific constitutional provisions, but by its very nature, that, irrespective of any specific constitutional provisions, an assessment must be so limited in order to be a tax, and that an assessment not so limited is not a legitimate exercise of the power of taxation, but is, on the other hand, a case of confiscation and spoliation.”

The rulings of this Court are in complete accord with our statement of the law, as will appear from the following quotations from its opinions:

“In judging what is ‘due process of law’ respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be ‘due process of law’; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law” (*Hagar v. Reclamation District*, 111 U. S. 701, *l. c.* 708, where these remarks are quoted with approval from *Davidson v. City of New Orleans*, 96 U. S. 97, *l. c.* 107.

In *Norwood v. Baker*, this Court said, 172 U. S. 269,

at page 278, speaking through Mr. Justice Harland:

“The power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guarantee for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country
* * *

“In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation.”

In *Railroad v. Barber Asphalt Co.*, 197 U. S. 430, this Court upheld the assessment only “as embodying a principle generally fair and doing as nearly equal justice as can be expected”. And when that case was subsequently referred to in *Martin v. District of Co-*

lumbia, 205 U. S. 135, *l. c.* 139, the following comment was made by this Court with reference to it:

“But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent.”

And the governing rule has been thus laid down in *Cotting v. Godard*, 183 U. S. 79, *l. c.* 110, 111, 112:

“The laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. But that inequality is something which it is impossible to foresee and guard against, and therefore such resultant inequality in the operation of law does not defeat its validity. * * *

“But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed.”

V.

The application of the requirement for approximate equality in special taxation to the legislative rule established by the Charter of the City of St. Louis demonstrates the unconstitutionality of the Charter provision.

We come now to consider the application of the rule to which we have referred, namely, the requirement for approximate equality, and such fairness of distribution as is feasible in the apportionment of special taxes for a local improvement.

At the very outset we desire to refer to the forms of assessment which have been approved by this Court, and generally by the courts of the different states, since we know that these will be relied upon by counsel for the defendant in error.

The first form of assessment which calls for attention and the one generally in use is what is known as the front-foot rule. That has been held to be, and is, in accordance with the requirement for equal taxation.

All in all, it is as fair a general rule as can be prescribed; for the benefits accruing to abutting property from the improvement of a street are in fact usually proportionate to the frontage. It is the frontage on the street which gives the property its value; and

the relative benefit from the improvement of the street, therefore, corresponds with the frontage.

There are but few instances in which the benefit from the improvement is not thus in exact accord. It sometimes happens that the depth of a lot is shallow; and it sometimes happens that a lot is below grade; but the application of the frontage rule does not, even in these instances, do serious injury.

If the lot is shallow, nevertheless its frontage upon the improved street receives the main benefit afforded by the street, and if the lot happens to be below grade, nevertheless it will receive its proportionate benefit when graded or fitted for use.

These are the only instances which we can conceive in which some inequality of apportionment is produced by the front foot rule. They are infrequent. The property assessed, when they occur, is not subjected to heavy taxation. Nor do these instances cause the bulk of the cost of any improvement to be cast upon any one property or upon any combination of properties, as is done by the rule of apportionment now under discussion.

Another form of assessment, which has been approved by this Court, is the rule adopted by Kentucky, to which we have already referred, namely, the form of assessment to the middle of the block. That rule, as construed by the Courts of Appeals, Kentucky, is also approximately just. Blocks in the same neighbor-

hood, if restricted to property subdivided into city blocks, are usually of the same dimensions and, therefore, exact justice is done by the Kentucky rule. It will also be borne in mind that the Kentucky statute defines a block as territory surrounded by four principal streets. The evident idea was to render all property in the block liable to only two assessments and no more; for, under this rule, all the property in every block will be subject to taxation for two of these streets **and no more**. This, however, is not the case with respect to the rule under discussion. In the case of *Gilsonite, Etc., Co. v. St. Louis Fair Ass'n*, 231 Mo. 589, the depth of the property assessed was 1,947.5 feet. There were five streets parallel to the improved street which ran to the property assessed and which, if projected, would pass through that property. The projection of these streets is only a question of time and consequently under the charter provisions of the City of St. Louis, as construed by the Supreme Court, the property assessed would be subject not merely to two assessments, as it would under the Kentucky rule, but would be subject to assessments for the improvement of the prolonged streets.

The only other form of general rule for local assessments which we recall as having been approved by this Court is the rule for the apportionment of a tax for the construction of a sewer according to the superficial area of the property drained by the sewer. That

case is a perfectly fair form of assessment and corresponds exactly with the benefit produced by the local improvement. This, however, cannot be said, even by the most ardent advocate with regard to the rule under discussion. The various cases which we have cited from the judicial reports of Missouri establish this; and if recourse be had to the doctrine of judicial notice, as we claim should be done, and cognizance be taken not merely of the cases which have already come before the Appellate Courts of Missouri, but of all the gross inequalities produced by the system of taxation under discussion, the result will be still more convincing.

The form of assessment, which we are attacking, has no just or fair relation to the actual benefits produced by the local improvement. That is the serious objection to it. The amount of the assessment under it results not from a consideration of actual benefit, but from a fortuitous or accidental circumstance, namely, the distance which happens to exist between the street improved and the next parallel or converging street, no matter how far distant.

Nothing like this has ever been attempted anywhere; the form of assessment under the Charter of the City of St. Louis, as construed by the Supreme Court of the State, IS WITHOUT PRECEDENT OR PARALLEL.

When a similar construction of the Kentucky statute was contended for the Court of Appeals of that State,

in denying the contention in *Louisville v. American Asphalt Company*, 125 Ky. 497, *l. c.* 504, said: **“This is necessary to comply with the requirements of the law of equality of burden,”** citing *Preston v. Roberts*, 12 Bush. 584, to which we have alluded, *ante*, p. 39. Thus that Court virtually declared **that the construction contended for would render the law unconstitutional.**

And in *McGrew v. Kansas City*, 64 Kan. 61, *l. c.* 64, the Supreme Court of Kansas, after saying that a claim that a tract of unplatted land “is deemed to be benefited to the center of the tract” is not reasonable, adds:

“If an eighty-acre tract were so situated, could it be contended that it constituted a block within the Legislature’s intention, **or that an improvement of a street through one end of the tract could be regarded as a special benefit to the center of the tract one-fourth of a mile away?**” (The bold-face type are our own.)

VI

We may remark that the question in this case is not merely that of the effect of the charter provisions of the City of St. Louis upon the taxation in this particular case, but is a question of general effect of those provisions. If they violate the requirement for approximate equality in the apportionment of special taxes they are unconstitutional and if they are unconstitutional they can-

not give rise to valid taxation. And if it were necessary for us to show special damage in order to invoke their unconstitutionality, it would surely be material to what extent that damage exists. If a law is unconstitutional and any damage results therefrom, the injured party may invoke protection against it.

This has been expressly held in

White v. Gove, 183 Mass. 333, *l. c.* 337, 338;

Dietz v. City of Neenah, 91 Wis. 422.

Said the Supreme Court of Massachusetts in the former:

“It is contended that the statute now in question, though unconstitutional in cases like those before the Court when it was formerly considered, is constitutional when applied to cases like the present. This contention is not well founded. It was held unconstitutional in those cases because it was of general application to sewers to be constructed in all parts of Boston, through streets or private lands, and it was apparent that cases would arise in the general application of it in which, if it was carried out, it would produce disproportional and unreasonable taxation. In *Dexter v. Boston*, *ubi supra*, the Court says: ‘In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the Constitution in its application to cases which may be expected to arise.’ ”

And the holding in *Dietz v. City of Neenah, supra*, as set forth in the *syllabi* of the case, was as follows:

“Where a special assessment is void because the law under which the proceedings were had is unconstitutional and void, it need not be shown to be inequitable in order to have its collection restrained.”

But if it were necessary to show the extent of the special injustice produced by the charter provisions in the case at bar, their gross inequality and harsh injustice are indicated by the facts.

Because the property of plaintiffs in error happened to be unplatted at the time of the improvement a street (Church Road) a thousand feet away, a mere accident, fixes the taxing district boundary line through the property of plaintiffs in error nearly 500 feet from Broadway, including all of said property between that line and Broadway within the taxing district, while all around this property other land, because it happened to have been divided into city blocks, some diagonal blocks, with nearer parallel or converging streets, or because in one case there was literally no parallel or converging street on that side, the boundary lines through such other properties are fixed at distances of 25 feet to 240 feet from Broadway, excluding large areas of such other property from the taxing district which are the same distance from the improvement and bear the same relation thereto as a

large part of the property of the plaintiffs in error which is included. The land of the plaintiffs in error bears a very unequal share of the cost of the improvement of Broadway, since it is assessed to a depth of nearly three times the depth of the property directly opposite and on an average of from four to eight times the depth of all of the 700 feet of property on the same side of the street to the south. A short distance south of this property one of the streets runs very close to Broadway and finally runs into it, with the result that all the property in city block 4279 (see first or second plat at pages 107, 108) is assessed for an average depth of less than 60 feet, and at one point the midway line is drawn just 24 feet west of Broadway, so that some of the property of the plaintiffs in error is taxed to a depth more than **twenty times greater than some of the property on the same side of the street in said city block 4279.** To merely describe this precious scheme is to denounce it as grossly inequitable, harsh and confiscatory. If it can be upheld, then there is indeed no protection to the citizen against arbitrary exactions.

Under this charter provision, it is to be remembered, the assessment is by mere superficial area, and the total cost of the improvement is imposed upon all the property in the district. There can be no reason why all property occupying the same relative position with respect to the improved street should not be taxed alike, and it is

obvious that if some property is taxed while other property in the same situation is not taxed, the property that is taxed is made to assume an unjust proportion of the burden; and if the property which is omitted is not benefited, then the taxed property in the same situation is not benefited. Applying this reasoning to the case at bar, we challenge anyone to designate a single possibility of benefit at any point on the property of plaintiffs in error which does not equally attach at the corresponding point back of all the other 700 feet of land on the same side of the street which is assessed on an average depth of much less than 100 feet and on all the other land on the opposite side of the street which is assessed at depths of 80 to 240 feet. If the land behind said 100-foot line, or 80-foot line, or 240-foot line has been omitted because not benefited, then the property of plaintiffs in error behind like lines should be likewise omitted because not benefited. Part of the property of plaintiffs in error assessed for over NINE THOUSAND DOLLARS is all in exactly the same situation with respect to the improvement as a much larger area which is not assessed one cent on account of the improvement. Furthermore, benefits to be derived by that part of the property of plaintiffs in error that is nearly 500 feet removed from Broadway and separated by a large tract of land, and without any access to the improvement, is bound to be so small as to make the assessments amount to confiscation. See *Construction Co. v. Hauessler*, 201 Mo. 400, *l. c.* 411.

As we said in *Seattle v. Kelleher*, 195 U. S. 358, "It looks like an unwarrantable attempt to make one man pay for another man's convenience."

The charter provisions now under discussion are no longer in force. The fact that they have been discarded is a recognition of their injustice and of the gross inequalities produced by them.

It is respectfully submitted that the judgment of the Supreme Court of Missouri should be reversed.

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DAVID GOLDSMITH,

Attorneys for Plaintiffs in Error.

It has been agreed by written stipulation filed in this court that cause No. 210, between the same parties, involving the same principles, may abide the result of the decision in this cause.

IN THE
SUPREME COURT OF THE UNITED STATES

RECEIVED
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JAN 20 1915
JAMES T. HANLEY

OCTOBER TERM, 1915

No. 211

EAST REALTY AND INVESTMENT
COMPANY and EMILY BASS

Plaintiffs in Error

vs.

SCHNEIDER DRAPERY COMPANY

Defendant in Error

Brief and Argument of Defendant
in Error

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(250820)

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IN THE
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SCHNEIDER GRANITE COMPANY,

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Brief and Argument of Defendant
in Error

STATEMENT

Defendant in error was the contractor for the paving with granite of a certain portion of Broadway, one of the principal streets of the City of St. Louis. Upon completion, the work was accepted by the proper officers of the City of St. Louis and an assessment to cover the costs thereof was duly made against all the lots

and parcels of ground lying within a benefit district, "conformably to the City Charter," as plaintiffs in error put it in their statement; and as a result special tax bills were duly delivered to the contractor, among them being the one now in controversy. In due time said contractor instituted suit in the Circuit Court of the City of St. Louis to enforce the special tax bill thus issued against the property of plaintiffs in error herein, and in answer thereto they averred that said tax bill was void for a number of separate reasons. Judgment was entered in the trial court in favor of the contractor for \$16,520.12 and on appeal to the Supreme Court of Missouri said judgment was affirmed. The cause was then brought here by the said property owners upon writ of error.

All the alleged defences to the tax bill have been weeded out of the case, excepting the one upon which plaintiffs in error contend that said assessment on their property violates the first section of the fourteenth amendment to the constitution of the United States. The allegations and facts upon which this particular alleged defence is bottomed are about as follows:

The charter under which the assessment was levied provides that benefit districts shall be ascertained (1) by drawing a line midway between the street improved and the next parallel or converging street, and (2), if there be no parallel or converging street on either side of the street improved such line shall be drawn 300 feet from and parallel to the street improved, but (3) if there be a parallel or converging street on one side of the street improved (but not on the other) then the line on the other side shall be drawn parallel to

the street improved at the average distance of the opposite district line.

Broadway was the street improved in this instance and the next street lying to the west of that part of it on which defendants' ground had a front of 1083.88 feet, was Church road, a dedicated public street about 900 feet distant from Broadway; and the district line running north and south was drawn midway between Broadway and Church road, thus bringing within the benefit district a strip of defendants' ground about 450 feet wide and fronting about 1084 feet on Broadway. We quote from the answer:

“* * * And defendant states that Church road is not and was not, within the meaning of the Charter of said City of St. Louis, the nearest parallel or converging street to said Broadway on the west of said Broadway; that on the west of said Broadway there is not and was not at any of the times mentioned in said amended petition any parallel or converging street to said Broadway within the meaning of said Charter, and that the benefit area district line on the west of Broadway should have been drawn across this defendant's property at a distance west of Broadway equal to the average distance of the opposite district line on the east side of Broadway.”

Said answer next alleges that the ground assessed was a large unplatted and undivided area (it was in fact used as a baseball park and summer resort) which would eventually be cut into ordinary city blocks by opening streets through it and that a public street to the north of it, Jordan street, would divide it if continued southwardly. We again quote from the answer:

“And this defendant states that if said Section 14 of Article VI of the Charter of the City of St. Louis be so construed as to include within the benefit district for the improvement of said Broadway the said property of the defendant described in plaintiff’s amended petition, then said Section 14 of Article VI of said Charter is illegal and void, in that said section of said Charter, if so construed, would impose grossly unequal, unfair and inequitable burdens upon that part of defendant’s above described property west of a line drawn across this defendant’s property at a distance west from Broadway equal to the average distance of the opposite district line from said Broadway on the east side thereof; and, if so construed and enforced, would deprive the defendant of the equal protection of the laws and deprive defendant of its property without due process of law, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States, and contrary to Section 20 of Article II of the Constitution of Missouri, and contrary to Section 30 of Article II of the Constitution of Missouri.”

The Supreme Court of Missouri decided that Church road was, within the meaning of the Charter of the City of St. Louis, as well as in fact, the nearest parallel or converging street to Broadway on the west of that portion of Broadway upon which appellants’ property fronted; and that the provision of the Charter requiring the boundary line of the benefit district to be drawn midway between the street improved and the next parallel or converging street was not contrary to Section 1 of Article XIV of the Amendment to the Con-

stitution of the United States, even though the property affected was a large unplatted tract or parcel. And the issue tendered here at this time is thus set out in the brief of plaintiffs in error at page 17:

“We take it that the construction thus placed by the Supreme Court of Missouri upon the charter provision in question is conclusive, and that the only question, therefore, left for determination in this Court is whether the Charter provision of the City of St. Louis, thus construed, is repugnant to the Constitution of the United States.”

That statement of the question, concise as it is, is a trifle broad, because on the record in the case the question is narrowed to this: Is the Charter provision of the City of St. Louis, as construed by the Supreme Court of Missouri and applied in the present case, repugnant to the first section of the fourteenth amendment of the Federal Constitution? If this question is here decided in the affirmative, plaintiffs in error will have the benefits of the improvement to their property and the contractor will be absolutely without redress, although this Court has heretofore repeatedly and uniformly upheld hard and fast rules for assessments for cost of local improvements, similar in principle to the rule now under discussion.

In this connection it will be observed that in the answer filed in the trial court no averment is made that the assessment against the ground herein involved exceeded the benefits conferred upon it by the improvement.

POINTS AND AUTHORITIES

I.

The Charter provisions under which this assessment was made are not repugnant to the 14th amendment of the Constitution of the United States.

Shumate v. Heman, 181 U. S. 402;
French v. Barber Asphalt Paving Co., Ibid, 324;
Schulte v. Heman, 189 U. S. 507.

II.

An assessment against all the ground within an improvement district will not be overthrown merely because one part of ground within the district may have received greater benefit from the improvement than another part; nor for the reason that the improvement does not adjoin or abutt a particular piece of ground within such district.

Davidson v. New Orleans, 96 U. S. 97;
Kelly v. Pittsburg, 104 U. S. 78;
Hager v. Reclamation District, 111 U. S. 701;
Spencer v. Merchant, 125 U. S. 345;
Fallbrook Irrigation District v. Bradley, 164
U. S. 112;
Cleveland, etc. R. Co. v. Porter, 210 U. S. 177,
l. c. 184.

III.

The question as to whether a particular piece of property is benefited by a local improvement and to

what extent is legislative; and not subject to judicial review.

Spencer v. Merchant, *supra*;

Webster v. Fargo, 181 U. S. 394;

French v. Barber Asphalt Paving Co., 181 U. S.

324;

Chadwick v. Kelly, 187 U. S. 540, *l. c.* 545;

Schaefer v. Woerling, 188 U. S. 516.

ARGUMENT

The provision of the Charter of the City of St. Louis now under discussion, Section 14, Article VI, required that the cost of the improvement in question be levied as follows: One-fourth upon all the ground fronting the improvement according to its frontage, and three-fourths upon all the ground, according to its area, lying within a certain district.

The front foot rule of assessment was sustained by this Court in the case of *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, as was the area rule in the case of *Shumate v. Heman*, 181 U. S. 402, on the principle that the question was a legislative one. In each of these cases it was contended in this court, as in the present case, that the Charter rule involved violated the Federal Constitution. Plaintiffs in error cite no decision to the contrary of these two cases and we, with diligent search, find none. How, then, can it be successfully argued now that the rule which but combines said two approved rules, violates the Federal Constitution?

Though unnecessary, here follows a short review of cases in and expressions of this Court anterior to the *French* and *Shumate* cases.

In the case of *Davidson v. New Orleans*, 96 U. S. 97, involving assessments against all the ground in a large reclamation or drainage district, comprising at least two parishes in the State of Louisiana, it was contended that because certain property within such district happened to be so situated as not to require any drainage, violence was done to the 14th amendment of

the Constitution of the United States in assessing it, and Mr. Justice Miller in the opinion of the Court said:

“It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this Court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.”

The case of *Kelly v. Pittsburg*, 104 U. S. 78, involved taxation for municipal purposes (such as water, lights, etc.), of farm lands lying adjacent to the municipality of Pittsburg, and it was said that:

“It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that the tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens and fairness in their distribution among those who must bear them? * * *

“The Court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law.”

In *Hager v. Reclamation District*, 111 U. S. 701, it was also held that inequalities in benefit was no valid objection to a special assessment levied to defray cost of drainage within such district.

In the case of *Spencer v. Merchant*, 125 U. S. 345, provision was made by the Legislature of New York for the opening and improvement of a highway, and fixing a district extending 300 feet each way from such highway, and providing for assessment according to a fixed rule, against each lot of ground within such improvement district; and this Court was required to pass upon the validity of such assessment against property within said district but not fronting on the highway improved.

“The lots so assessed were isolated parcels, not contiguous, and many of them not fronting on the avenue” (improved).

Spencer v. Merchant, *supra*, p. 349.

Judge Finch, of the New York Court of Appeals, in passing upon that case, said:

“The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power its decision must, of course, be final.”

Ibid, p. 353.

Which language was adopted and approved by this Court, Mr. Justice Gray, in the opinion, saying:

“In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction.”

An unusually full discussion of the subject here involved was had in the case of *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112. There counsel, among the most eminent of their generation, vigorously and learnedly contended against the assessment on the ground that lands naturally fertile could not lawfully be assessed for the cost of supplying water to arid lands lying within the same district; but this Court decided to the contrary, and held that the mere fact that the improvement was of more benefit to some lands than to others within the district furnished no valid objection to the assessment of all lands within such district according to their area.

Though the above mentioned cases seem to put at rest the contention of the plaintiffs in error herein, that the assessment of their lot, under the circumstances, for proportionate part of the cost of construction of the improvement in the district in which it lies, is in violation of the Constitution of the United States, or its amendments, nevertheless, we will call attention to a few other expressions of this Court uttered in cases of substantially similar issues, and which are sufficient to show that the question here raised is no longer open to discussion.

“The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency.” (Dillon’s Municipal Corporation.)

French v. Barber Asphalt Paving Co., 181
U. S. 324-344.

“But we agree with the Supreme Court of North Dakota in holding that it is within the power of the legislature of the State to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said districts, either according to valuation, or superficial area, or frontage, and that it was not the intention of this Court, in *Norwood v. Baker*, to hold otherwise.”

Webster v. Fargo, 181 U. S. 394.

“It is too late to question the right of the general assembly to establish particular districts for the attainment of special local public good, through works of a particular character, and to order itself, or authorize some political body to order, special assessments to be made, within the

district, for the purpose of meeting the cost and expenses of such works. *George v. Young*, 45 La. Ann. 1232, 14 So. 137. It is true that in some instances almost the whole benefit accrues to a few, but there can be no universal rule of justice, upon which such assessments can be made; an apportionment of the cost that would be just in one case would be oppressive in another. For this reason the power to determine when a special assessment shall be made, and on what basis it shall be apportioned, rests in the legislature or some political body to which it has delegated that authority.

* * * * *

“Having done so, the legislature itself has designated how, in what proportion, and by what standard this cost is to be met. The council was not at liberty to depart from this apportionment. The judiciary is not authorized to alter it and to substitute for a fixed legislative standard, a fluctuating judicial standard (based upon actual benefits received) and measured by values or enhanced values to be established by evidence and proof.”

Chadwick v. Kelly, 187 U. S. 540, *l. c.* 545.

The following language of Mr. Justice Miller has many times been reiterated by this Court in cases where it was contended that special assessments according to a fixed legislative rule were contrary to the 14th amendment of the Federal Constitution:

“It would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of this

Court the abstract opinion of every unsuccessful litigant in a State court of justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.”

Davidson v. New Orleans, *supra*, l. c. 103.

And the more recent case of Schulte v. Heman, 189 U. S. 507, should be kept in mind. There the provision of the Charter of the City of St. Louis bearing on the subject required that all lots and parcels of ground lying within the sewer district should be assessed according to their area for the cost of construction of sewers; and the ground of Schulte, though it did not and could not connect with the sewer, nevertheless was assessed for a proportionate part of the cost of its construction and a judgment was given in the courts of Missouri enforcing the special tax bill resulting from such assessment. On hearing on the writ of error from this Court, it was contended that such assessment and the provision of the Charter authorizing it were in violation of the 14th amendment to the Constitution of the United States. But this Court made the following order:

“Per Curiam. Judgment affirmed with costs, on the authority of Shumate v. Heman, 181 U. S. 402; French v. Barber Asphalt Paving Company, 181 U. S. 324; Chadwick v. Kelly, 187 U. S. 540; Fallbrook Irrigation District v. Bradley, 164 U. S. 112; see Heman v. Schulte, 166 Mo., 409.”

We submit, in view of the expressions of this Court in the cases of French v. Barber Asphalt Paving Company, Chadwick v. Kelly, Schulte v. Heman, and the long line of cases there cited, that the rule of **stare**

decises applies to the third proposition of our brief, namely: "The question as to whether a particular piece of property is benefited by the local improvement and to what extent is legislative; and not subject to judicial review." It is well known that in every part of this country local improvements have been, and are now being, made on faith in the rule announced in these cases; and that enormous sums of money have been invested under the assurance given by them.

In opposition to the foregoing array of authorities, plaintiffs in error rely upon various decisions of State Court rendered in cases involving legislative provisions, with reference to local improvements, widely differing from the provisions of the St. Louis Charter; upon certain decisions of the Supreme Court of Massachusetts based upon an interpretation of *Norwood v. Baker*, which interpretation this Court afterwards said, in *French v. Barber Asphalt Paving Co.*, was contrary to its intention; and on the further contention that the case at bar is controlled by that of *Norwood v. Baker*.

In *French v. Barber Asphalt Paving Co.*, *supra*, Justice Shiras, in the opinion and in discussing the question involved in *Norwood v. Baker*, said:

"* * * But we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood v. Baker*. That was a case where, by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the cost and expenses of condemnation proceedings, was thrown upon the abutting property

of the person whose land was condemned. This appeared, both to the Court below and to a majority of the judges of this court, to be an abuse of the law, and an act of confiscation, and not a valid exercise of the taxing power.”

The question now before the Court arises from a special assessment against all the property within an improvement district, no attempt having been made to take any piece of said property for public use; and presents an instance of the exercise of the taxing power for benefits conferred according to legislative determination.

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Counsel for plaintiffs in error devote much space to the facts and contentions in other cases arising in the City of St. Louis resembling the present case in some respects only, and certain Kentucky cases, and evince a desire to argue some of those cases rather than their own; but we assume that this Court is not at present concerned about such other cases, but will determine the case at bar upon its record alone. Suppose, for the sake of argument, that the lower courts did, and this Court will take judicial notice of the location, direction, etc., of the streets of the City of St. Louis, it does not follow that they were, or now are, required to decide questions in respect thereto not raised by pleadings or otherwise in the present case.

Plaintiffs in error have neither pleaded nor endeavored to prove that their property has not been benefited to the full extent of its assessment. Their sole complaint seems to be that the Charter provision might

so operate in some other case to impose a special tax upon the property in the City of St. Louis which would not be benefited by the improvement for which the tax is levied. It is hard to see how this proposition, if true, could serve to release plaintiffs in error in the case at bar. If in this case they have received full benefit, and they have not pleaded that they have not, can they escape payment because on some other occasion some other property might have been, or may be, taxed in excess of benefits conferred? It would be a strange doctrine to hold that plaintiffs in error can escape payment for value received because of a possibility that someone else—not here complaining or herein involved—might have suffered hardship. Such is surely not the law. If this Charter provision were unconstitutional at all, it would only be in those cases wherein its application would impose a tax without corresponding benefit and not as in the instant case where the proportion that the benefit bears to the tax is not in issue.

And, besides, if the courts assume to know judicially the geography of the City of St. Louis and that some of the tracts of land liable to assessment for local improvements are acre property undivided and unplatted, will not the Court also assume that the framers of the Charter provisions, which are equivalent to statute laws, also knew about these large tracts of ground and that they are used for various purposes inconsistent with subdivisions into city lots, such, for instance, as a baseball park in the present case, a race track in the Fair Association case, upon which counsel delights to comment, and a clay burning plant in a case now said to be pending in the courts of Missouri, ultimately to reach this court. Can it be said that properties so used

as to thwart the development of the city in their localities into ordinary lots and blocks, are to be excepted from general rules for assessment for local improvements? And on the other hand, although the owners of these large tracts find it more profitable to keep them intact for their special purposes than to subdivide them into ordinary city lots, does it follow that these large tracts are not benefited as a whole to the extent of assessments made against them for the cost of construction of streets and sewers in the districts in which they lie? Do not people travel over improved streets on their way to baseball parks and race tracks; do not manufacturing plants make use of streets adjacent to their properties; and do not sewers benefit them all?

Counsel reserve to the last the gratuitous suggestion that the Charter provisions now under discussion are no longer in force, and intimate that they may have been discarded in recognition of their iniquity. Though the people of St. Louis in their progress have adopted a new Charter which itself provides for benefit districts for local improvements, it is, nevertheless, a fact that many special tax bills arising from assessments levied pursuant to the provision now under discussion and amounting in the aggregate, it is safe to say, to more than a million dollars, would be utterly destroyed should the present contentions of plaintiffs in error be accepted by this Court. And we may add that the great expenditure of labor, material and money in the construction of the work giving rise to those bills was due to faith in the rulings of this Court in the cases upon which we now rely.

It is respectfully submitted that the Supreme Court of Missouri is in harmony with the rulings of this court on the subject here presented; and is in the right.

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